TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 121.

THE UNITED STATES, APPELLANT,

vs.

MASON & HANGER COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 28, 1922.

(25205)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 410.

THE UNITED STATES, APPELLANT,

vs.

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1 Court of Claims.

MASON & HANGER COMPANY
vs.
THE UNITED STATES. } No. 34208.

I. *Petition and amended petition.*

On October 1, 1919, the plaintiff filed its original petition and Exhibit "A" to same.

On February 16, 1920, by leave of court, the plaintiff filed its amended petition, which is as follows:

II. *Amended petition.*

[Filed February 16, 1920.]

To the honorable the Court of Claims:

The claimant, Mason & Hanger Company, respectfully represents:

I. That it is a corporation organized under the laws of the State of Kentucky with its principal office and place of business at Richmond, Madison County, of said State.

II. On the 20th day of June, 1917, a contract was signed by it represented by its president, H. B. Hanger, and by Major W. A. Dempsey, U. S. A., on behalf of the United States, which contract became effective on its date, whereby the claimant agreed to furnish the necessary labor, material, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and completion of certain buildings and other utilities at Camp Zachary Taylor near Louisville, Kentucky, on the basis of cost plus a fixed profit of fee for the work done. A copy of said contract is attached to the original as Exhibit "A" and is made a part hereof.

III. Said contract provided in Article II, Section (h), that the contractor, among other items of cost, should be reimbursed for such of its expenditures made on account of the premiums on such bonds, fire, liability, and other insurance as the contracting officer
2 might approve or require. On entering upon the work claimant through its representative procured the usual and necessary public liability, automobile liability, and burglary and hold-up insurance, and in due course paid the necessary premiums on such insurance as follows:

(a) Public liability insurance	$7,111.14
(b) Automobile liability insurance on trucks hired by the contractor but operated by owners	715.56
(c) Automobile liability insurance on machines operated by the contractor	835.27
(d) Burglary and hold-up insurance on pay-roll funds	452.55

IV. These policies were taken out by claimant without antecedent request of the contracting officer. Colonel (later Brigadier-General)

I. W. Littell, who was then Chief of Cantonment Construction in the War Department, was on July 16, 1917, substituted by the Secretary of War as contracting officer in place of Major W. A. Dempsey, the original contracting officer, said Colonel Littell being then the immediate superior of said Major Dempsey. Said Colonel Littell, under date of December 22, 1917, addressed a letter to the Constructing Quartermaster at Camp Zachary Taylor approving the insurance theretofore procured and directing that the contractor be reimbursed the expenditures made on account of the cost thereof amounting to $9,114.52, his said approval and directions being in the following language:

"2. As contracting officer, I hereby approve the action of Mason & Hanger Company, the contractor, in taking out these policies of insurance, and I hereby authorize you as quartermaster to reimburse Mason & Hanger Company the sum of $9,114.52, the amount of premium paid upon these policies of insurance."

3 This action was taken in accordance with a policy established by the Chief of the Construction Division of the War Department, under the authority of the Secretary of War, and was approved by the Chief of the Construction Division.

V. The constructing quartermaster having some doubt, notwithstanding such direction and approval, as to the propriety of paying the charges in question, submitted the question to the Comptroller of the Treasury, which officer disapproved the payment, and the constructing quartermaster refused reimbursement accordingly. The contractor thereupon filed claim with the Auditor for the War Department for payment and his claim was disallowed. On appeal to the Comptroller of the Treasury, the auditor's action was on June 25, 1919, affirmed.

VI. Claimant now represents that the several policies of insurance as above listed were obtained with the approval of the contracting officer and in pursuance of the contract undertaking, and that it had made net expenditures therefor as an incident to the performance of the contract work, amounting to $9,114.52, and it now claims the said sum of $9,114.52.

VII. Said contract of June 20, 1917, further provided among other things in Article II as follows:

"Cost of the Work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items.

* * * * * * *

"(h) Such bonds, fire, public liability, employer's liabil'y, workmen's compensation, and other insurance as the contracting officer may approve or require."

* * * * * * *

4 Said contract further provided in Article IX as follows:

"Bond.—The contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the contract-

ing officer, in the sum of two hundred and fifty thousand dollars ($250,000), conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material or other service furnished to the contractor."

VIII. On entering on the work, claimant through its representatives procured the surety bond required by Article IX above quoted and such bond was duly approved by the contracting officer or his representative. Its subcontractor, Scheirich and Meyer, also at the instance and under the requirement of the contracting officer, furnished a bond for forty-five thousand dollars ($45,000), which was likewise approved.

IX. The contractor thereafter paid the actual necessary cost of the bond given by it and the bond given as aforesaid by its subcontractor, Scheirich and Meyer, amounting in the first case to two thousand five hundred dollars ($2,500) and in the second to four hundred and fifty dollars ($450), or two thousand nine hundred and fifty dollars ($2,950) in all, and presented vouchers covering such payments to the contracting officer for his approval and payment, and the said sums of two thousand five hundred dollars ($2,500) and four hundred and fifty dollars ($450), respectively, were upon the approval of the contracting officer duly reimbursed to the contractor. Such payment was made under the following provision of the contract, Article IV:

"Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) The cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to two and one-half per cent (2½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed payrolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding two and one-half per cent (2½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof."

X. The Comptroller of the Treasury later ruled that the form of contract used here and in all other cases of like character did not form a legal basis for the reimbursement to the contractor of cost of premiums on surety bonds. In accordance with this decision on final settlement of moneys due under this contract the sum of two thousand nine hundred and fifty dollars ($2,950) representing the sums previously reimbursed as covering the costs incurred on account of surety bonds was deducted and withheld from moneys due the
6 contractor as reimbursement to the United States of the sums previously paid the claimant, covering cost of premiums on surety bonds as aforesaid. Such deduction was made in the accounts of Ira J. Hooks, Captain, Quartermaster Corps, U. S. Army, for the month of January, 1920, voucher No. 44.

Claimant refused to agree to said deduction and protested against same by placing on the voucher aforesaid the following statement:

"It is to be understood that in accepting payment evidenced by the attached voucher under our contract of June 20, 1917, for the construction of the Louisville cantonment, afterwards known as Camp Zachary Taylor, we do so without in any wise waiving our legal rights to full reimbursement under the terms of our contract of all sums paid by us as premiums on bonds. We expressly reserve our rights to reimbursement of all sums paid by us on such account."

XI. Claimant now represents that the bonds given as above set forth were obtained with the approval of the contracting officer and by virtue of the contract provisions requiring the same to be given; that the cost of such bonds was a part of the cost of the work of constructing Camp Zachary Taylor; that said contractor made a net expenditure of two thousand nine hundred and fifty dollars ($2,950) on account thereof and that it has not been reimbursed the amount of such expenditure as provided for in the contract aforesaid.

XII. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; the
7 claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims twelve thousand sixty-four dollars and fifty-two cents ($12,065.52).

KING & KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys of the claimant corporation in this case. I have read

the above petition, and the matters therein stated are true, to the best of my knowledge, information, and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 2d day of February, 1920.
[SEAL.] MAY LOU H. BYINGTON,
Notary Public.

8 *Exhibit "A" to claimant's petition.*

Contract for emergency work.

Construction of cantonment at Louisville, Ky.

Contract made and concluded this twentieth day of June, 1917, by and between Mason & Hanger Co., of Richmond, Madison County, Kentucky, a corporation organized under the laws of the State of West Virginia, represented by H. B. Hanger, its president, party of the first part (hereinafter called contractor), and the United States of America by Major W. A. Dempsey, Q. M. U. S. R. (hereinafter called contracting officer), acting by authority of the Secretary of War, party of the second part.

Whereas the Congress having declared by joint resolution approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the work hereinafter described, and it is necessary that said work shall be completed within the shortest posible time; and

Whereas it is advisable under the disturbed conditions which exist in the contracting industry throughout the country for the United States to depart from the usual procedure in the matter of letting contracts, and adopt means that will insure the most expeditious results; and

Whereas the contractor has had experience in the execution of similar work, has an organization suitable for the performance
9 of such work, and is ready to undertake the same upon the terms and conditions herein provided:

Now, therefore, this contract witnesseth, that in consideration of the premises and of the payments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the contracting officer as follows:

Article I.

Extent of the work.—The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

At Louisville, Kentucky.

Buildings and other utilities except roads, stoves, bunks, mattresses, ranges, and refrigerators for an Infantry division including the following additional units, viz:

One additional brigade headquarters.

Two regiments of Infantry.

in accordance with the drawings and specifications to be furnished by the contracting officer, and subject in every detail to his supervision, direction, and instruction.

The contracting officer may, from time to time, by written instructions or drawings issued to the contractor make changes in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of construction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the contracting officer, all machinery, equipment, hand tools, supplies, and materials, for which the contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. These provisions as to title shall not operate to relieve the contractor from any duties imposed hereby or by the contracting officer.

Article II.

Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

(a) All labor, material, machinery, hand tools not owned by the workmen, supplies and equipment, necessary for either temporary or permanent use for the benefit of said work; but this shall not be construed to cover machinery or equipment mentioned in section (c) of this article. The contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done without the prior consent and approval of the contracting officer.

(b) All subcontracts made in accordance with the provisions of this agreement.

(c) Rental actually paid by the contractor, at rates not to exceed those mentioned in the schedule of rental rates hereto attached, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clam-shell or other buckets, electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineers' levels and transits, and

such other equipment as may be necessary for the proper and economical prosecution of the work.

Rental to the contractor for such construction plant or parts thereof as it may own and furnish, at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the
11 site of the work, the contractor shall file with the contracting officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final, unless the contracting officer shall, within five days after the machinery has been set up and is working, modify or change such valuation, in which event the valuation so made by the contracting officer shall be deemed final. When and if the total rental paid to the contractor for any such part shall equal the valuation thereof no further rental therefor shall be paid to the contractor and title thereto shall vest in the United States. At the completion of the work, the constructing officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

Rates of rental as substitutes for such scheduled rental rates may be agreed upon in writing between the contractor and the contracting officer, such rates to be in conformity with rates of rental charged in the particular territory in which the work covered by this contract is to be performed. If the contracting officer shall furnish or supply any such equipment, the contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment.

(d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be used in connection with said work subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use on the said work.

(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor and expediting the production and transportation of material and equipment.

(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the con-
12 tractor in connection with said work. In case the full time of any field employee of the contractor is not applied to said work but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

(g) Buildings and equipment required for necessary field offices, commissary, and hospital, and the cost of maintaining and operating said offices, commissary, and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

(h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided.

(i) Permit fees, deposits, royalties, and other similar items of expense incidental to the execution of this contract, and necessarily incurred. Expenditures under this item must be approved in advance by the contracting officer.

(j) Such proportion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the contractor as is actually incurred in connection with this work.

(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph.

13 The United States reserves the right to pay directly to common carriers any or all freight charges on material of all kinds and machinery, furnished under this contract and certified by the contracting officer as being for installation or for consumption in the course of the work hereunder; the contractor shall be reimbursed for such freight charges of this character as it shall pay and as shall be specifically certified by the contracting officer; but the contractor shall have no fee based on such expenditures. Freight charges paid by the contractor for transportation of construction equipment, construction plant, tools, and supplies of every character shall be treated as part of the cost of the work upon which the contractor's fee shall be based; provided that charges for transportation of such construction equipment, construction plant, and tools over distances in excess of five hundred miles shall require the special approval of the contracting officer.

No salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

The contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor.

All revenue from the operations of the commissary, hospital or other facilities or from rebates, refunds, etc., shall be accounted for by the contractor and applied in reduction of the cost of the work.

Article III.

Determination of fee.—As full compensation for the services of the contractor, including profit and all general overhead ex-
14 pense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

If the cost of the work is under $100,000.00 a fee of ten per cent (10%) of such cost.

If the cost of the work is over $100,000.00 and under $125,000.00 a fee of $10,000.00.

If the cost of the work is over $125,000.00 and under $250,000.00 a fee of eight per cent (8%) of such cost.

If the cost of the work is over $250,000.00 and under $266,666.67 a fee of $20,000.00.

If the cost of the work is over $266,666.67 and under $500,000.00 a fee of seven and one-half per cent (7½%) of such cost.

If the cost of the work is over $500,000.00 and under $535,714.29 a fee of $37,500.00.

If the cost of the work is over $535,714.29 and under $3,000,000.00 a fee of seven per cent (7%) of such cost.

If the cost of the work is over $3,000,000.00 and under $3,500,000.00 a fee of $210,000.00.

If the cost of the work is over $3,500,000.00 a fee of six per cent (6%) of such cost.

Provided, however, that the fee upon such part of the cost of the work as is represented by payments to subcontractors, under subdivision (b) above, shall in each of the above contingencies be five per cent (5%) and no more of the amount of such part of the cost.

The cost of materials purchased or furnished by the contracting officer for said work, exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the contractor, but for no other purpose.

The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof—not exceeding seven per cent (7%)—as the contracting officer may determine.

The total fee to the contractor hereunder shall in no event exceed the sum of $250,000.00, anything in this agreement to the contrary notwithstanding.

15 Article IV.

Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing

as completely as possible: (1) The cost of the work up to and including the last day of the previous month; (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to three and one-half per cent (3½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate not exceeding three and one-half per cent (3½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The contracting officer may also make payments at more frequent intervals for the purpose of enabling the contractor to take advantage of discounts at intervals between the dates above mentioned or for other lawful purposes. Upon final completion of said work the contracting officer shall pay to the contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

16 Article V.

Inspection and audit.—The contracting officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, to the work, and material, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to said work; and the contractor shall preserve for a period of two years after its completion or cessation of work under this contract, all the books, records, and other papers just mentioned. Any duly authorized representative of the contractor shall be accorded the privilege of examining the books, records, and papers of the contracting officer relating to said work for the purpose of checking up and verifying the cost of said work. The system of accounting to be employed by the contractor shall be such as is satisfactory to the contracting officer.

If at any time the contracting officer shall find that bills for labor or material or other bills legitimately incurred by the contractor here-

under, are not promptly paid by the contractor, the contracting officer may, in his discretion, refuse to make further payments to the contractor until all such obligations past due shall have been paid. Should the contractor neglect or refuse to pay such bills within five days after notice from the contracting officer so to do, then the contracting officer shall have the right to pay such bills directly, in which event such direct payments shall not be included in the cost of the work.

Article VI.

Special requirements.—The contractor hereby agrees that it will:

(a) Begin the work herein specified at the earliest time practicable, and diligently proceed so that such work may be completed at the earliest possible date.

(b) Promptly pay for all labor, material, or other service rendered.

(c) Procure and thereafter maintain such insurance in such
17 forms and in such amounts, and for such periods of time as the contracting officer may approve or require.

(d) Procure all necessary permits and licenses, and obey and abide by all laws, regulations, ordinances, and other rules applying to such work, of the United States of America, of the State or Territory wherein such work is done, of any subdivision thereof, or of any duly constituted public authority.

(e) Unless this provision is waived by the contracting officer, insert in every contract made by it for the furnishing to it of services, materials, supplies, machinery, and equipment, or the use thereof, for the purposes of the work hereunder, a provision that such contract is assignable to the United States; will make all such contracts in its own name, and will not bind or purport to bind the United States or the contracting officer thereunder.

(f) In every subcontract made in accordance with the provisions hereof, require the subcontractor to agree to comply fully with all the undertakings and obligations of the contractor herein, excepting such as do not apply to such subcontractor's work.

(g) At all times keep at the site of the work a duly appointed representative who shall receive and execute on the part of the contractor such notices, directions, and instructions as the contracting officer may desire to give.

(h) At all times use its best efforts in all its acts hereunder to protect and subserve the interest of the contracting officer and the United States.

Article VII.

Right to terminate contract.—Should the contractor at any time refuse, neglect, or fail in any respect to prosecute the work with promptness and diligence or default in the performance of any of the agreements herein contained, the contracting officer may, at his option, after five days' written notice to the contractor, terminate this contract, and may enter upon the premises and take possession,

18 for the purpose of completing said work, of all materials, tools, equipment, and appliances, and all options, privileges, and rights, and may complete, or employ any other person or persons to complete said work. In case of such termination of the contract, the contracting officer shall pay to the contractor such amounts of money on account of the unpaid balance of the cost of the work and of the fee as will result in fully reimbursing the contractor for the cost of the work up to the time of such termination, plus a fee computed thereon at the rate or rates for monthly payments set forth in Article IV hereof; and the contracting officer shall also pay to the contractor compensation, either by purchase or rental, at the election of the contracting officer, for any equipment retained; such compensation, in the event of rental, to be in accordance with paragraph (c) of Article II, and in the event of purchase to be based upon the valuation determined by the contracting officer as of the time of his taking such possession. The contractor hereby agrees that such payments when made shall constitute full settlement of all claims of the contractor against the contracting officer and the United States or either of them for money claimed to be due to the contractor for any reason whatsoever. In case of such termination of the contract the contracting officer shall further assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore in good faith undertaken or incurred in connection with said work, and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the contracting officer may require for the purpose of fully vesting in him the rights and benefits of the contractor under such obligations or commitments. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article, the contracting officer shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the contractor hereunder or on account hereof.

19 Article VIII.

Abandonment of work by contracting officer.—If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work; and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the contracting officer may require for the purpose of fully vesting in him the rights and benefits of the contractor under such obligations or commitments. The contracting officer shall pay to the contractor such an amount of money on account

of the unpaid balance of the cost of the work and of the fee as will result in the contractor receiving full reimbursement for the cost of the work up to the time of such abandonment, plus a fee to be computed in the following manner: To the cost of the work up to the time of such abandonment shall be added the amount of the contractual obligations or commitments assumed by the contracting officer, and such total shall be treated as the cost of the work, upon which the fee shall be computed in accordance with the provisions of Article III hereof. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article the contracting officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions or claims of any kind on the part of the contractor hereunder or on account hereof.

Article IX.

Bond.—The contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the contracting officer, in the sum of two hundred fifty thousand ($250,000.00) dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor.

Article X.

Convict labor.—No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor imposed by the courts of any of the several States, Territories, or municipalities having criminal jurisdiction.

Article XI.

Hours and conditions of labor.—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor, or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight (8) hours in any one calendar day upon such work, such prohibition being in accordance with the act approved June 19, 1912, limiting the hours of daily service of mechanics and laborers on work under contracts to which the United States is a party. For each violation of the requirements of this article a penalty of five dollars ($5.00) shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which said employee is required or permitted to labor more than eight (8) hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the United States; provided, that this paragraph shall not be enforced nor shall any penalty be exacted in case such violation shall occur while there is in effect any valid executive order suspending the

provisions of said act approved June 19, 1912, or waiving the provisions and stipulations thereof with respect to either this contract or any class of contracts in which this contract shall be included, or when the violation shall be due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire,
21 famine, or flood, by danger to life or property, or by other extraordinary events or conditions on account of which, by subsequent executive order, such past violations shall have been excused.

In the event of any dispute with reference to wages, hours, or other conditions appertaining to said work, between the contractor or any subcontractor and labor employed by him on said work, the contractor or subcontractor shall immediately notify the contracting officer of the existence of such dispute and the reasons therefor. The contracting officer may, at his option, instruct the contractor or subcontractor involved in such dispute as to the method or steps which the contractor or subcontractor should follow with reference thereto, and the contractor or subcontractor shall thereupon comply with such instructions.

Article XII.

Right to transfer or sublet.—Neither this contract nor any interest therein shall be assigned or transferred. The contractor shall not enter into any subcontract for any part of the work herein specified without the consent and approval in writing of the contracting officer. In case of such assignment, transfer, or subletting without the consent and approval, in writing, of the contracting officer, the contracting officer may refuse to carry out this contract either with the transferer or transferee, but all rights of action for any breach of this contract by the contractor are reserved to the United States.

Article XIII.

No participation in profits by Government officials.—No member of, or Delegate to, Congress, or Resident Commissioner, nor any other person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this article shall not apply to this contract so far as it may be within the operation
22 or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats. 1109).

Article XIV.

Settlement of disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions

of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination. If, however, the contractor shall feel aggrieved by the decision of the officer in charge of cantonment construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

Article XV.

This contract shall bind and inure to the contractor and its successors.

It is understood and agreed that wherever the words "contracting officer" are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War and any duly appointed representative of the contracting officer.

Witness the hands of the parties hereto the day and year first above written, all in triplicate.

MASON & HANGER CO.,
[SEAL] By H. B. HANGER,
President.

UNITED STATES OF AMERICA,
By W. A. DEMPSEY,
Contracting Officer.

23 SCHEDULE OF RENTAL RATES.

(The rates mentioned are per day.)

Automobiles	$5.00
Adding and listing machines	.20
Buckets, tipple and bottom dump	.25
Boring machine, pneumatic	.50
Boring machine, electric	.50
Buckets, orangepeel, 1 yard	3.50
Buckets, orangepeel, less than 1 yard	2.00
Buckets, clamshell	2.00
Boiler and 3 drum engine	3.50
Boiler and 2 drum engine	3.00
Boiler and 1 drum engine	2.50
Boiler only, 30 h. p. and smaller	1.50
Boiler only, larger than 30 h. p	2.00
Block machine, concrete	1.50
Cars, skip, 1½ yards	.25
Cars, skip, 3 yards	.50
Cars, steel, 1 yard and smaller	.15
Cars, 4 yards, wooden	.25
Cars, 6 yards, wooden	.75

	Cars, 12 yards, wooden	$2.00
	Cars, 1 yard, hopper, radial gate	.25
	Crushers only	2.00
	Crushers with elevator and screen	3.00
	Conveyor, gravity, per 100 feet	1.00
	Compressor, 10 x 10 with steam engine	2.50
	Compressor, 8 x 8, belt driven	1.00
	Compressor with gasoline engine on wheels	5.00
	Compressor, Westinghouse, 9½ inch	1.00
	Cableways, without engine	4.00
	Drill, auto traction	5.00
	Dump wagons	.25
	Diving outfit with pumps	10.00
	Derricks, 60 feet to 85 feet	2.00
	Derricks, 30 feet to 59 feet	1.50
	Derricks, less than 30 feet	1.00
	Derricks, breast	.25
24	Derricks, circular swing	.25
	Elevators, platform or bucket	.25
	Elevators with bins for concrete	.50
	Engines, skeleton, 3-drum	2.00
	Engines, skeleton, 2-drum	1.50
	Engines, skeleton, 1-drum	1.00
	Engines, steam, horizontal, 11 to 40 h. p	1.50
	Engines, steam, upright, to 10 h. p	.50
	Engines, gasoline, to 8 h. p	.50
	Engines, 2-drum, with electric motor	4.00
	Engines, gasoline, 10 h. p	1.00
	Engines, derricks, swinging	.50
	Hammers, riveting	.25
	Hod elevating machine	1.00
	Levelling instruments, engineers'	.25
	Locomotive, 36-inch gauge	5.00
	Locomotive, standard gauge	10.00
	Mixers with boiler sideloader	4.00
	Mixers with electric motors, 1 yard	4.00
	Mixers without boiler, less than 1 yard	2.00
	Mixers without boiler, 1 yd. and larger	3.50
	Mixers with gasoline engine	3.00
	Motorcycles	1.00
	Motors, 2 h. p	.15
	Motors, 5 h. p	.25
	Motors, 10 h. p	.50
	Motors, 25 h. p	1.00
	Motors, 50 h. p	2.00
	Pumps, centrifugal, 10-inch, belt driven	3.00
	Pumps, centrifugal, 10-inch, with motor attached	4.00
	Pumps, centrifugal, 8-inch, steam connected	2.00
	Pumps, centrifugal, 6-inch, steam connected	1.50

Pumps, centrifugal, 4-inch, steam connected	$1.00
Pumps, duplex and triplex, to 3-inch	.50
Pumps, pulsometer, to 4-inch	1.55
Pumps, diaphragm	.20
Pumps, diaphragm, with gas engine	1.05
Pumps, triplex, with belt drive	.20
Pile drivers, drop	1.50
Pile drivers, drop, with single drum engine and boiler	3.50
Pile hammers, steam, up to 2,500 lbs	3.00
Pile hammers, steam, larger than 2,500 lbs	5.00
Rail, per ton	.06
Roller, horse	1.00
Steam drills	1.00
Small air drills	.50
Steam roller	8.00
Steam shovel	30.00
Sprinkling cart	1.00
Saw benches	.25
Saw benches with motor or gasoline engine	.50
Scale boxes	.25
Scraper, wheel	.50
Transits	.50
Typewriter	.10

Fuel and lubricants not included in these prices.

III. *General traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by rule 34.

IV. *Argument and submission of case.*

On April 4, 1921, this case was argued and submitted by Mr. George A. King, for the plaintiff, and by Mr. John E. Hoover, for the defendant.

V. *Findings of fact, conclusion of law, and opinion of the court by Hay, J., and dissent by Campbell, Ch. J. Entered April 18, 1921.*

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The plaintiff, a corporation organized under the laws of the State of West Virginia, entered into a contract in writing with the United States on June 20, 1917, for the construction of buildings and other

utilities at Camp Zachary Taylor near Louisville, Ky. A copy of said contract is attached to the petition as Exhibit A, and is made a part hereof by reference.

II.

Maj. William A. Dempsey was the contracting officer named in the contract at the time of its execution. On July 16, 1917, Col. I. W. Littell, Q. M. C., was, by order of the Secretary of War, substituted for said Maj. Dempsey as contracting officer in this contract, as provided for in Article XV of the contract.

III.

Before this contract, or any other contract for cantonments or other construction for war purposes, was signed, negotiations were entered into between the War Department and the various surety companies as to the premium to be charged on bonds, the Secretary of War having directed that such premiums should be treated as part of the cost of the work. As the result of these negotiations the surety companies agreed to charge a premium of 1 per cent upon the penalty of the bond, their premium theretofore having been 2 per cent on the amount of work involved.

The War Department decided to fix the bond for the construction of each of the 16 cantonments for the National Army under the cost-plus system at $250,000. The contract of the plaintiff was to construct one of these cantonments, and its bond was fixed at $250,000.

28 Col. Littell, in charge of cantonment construction, notified both the plaintiff and the contracting officer that the rate had been fixed at 1 per cent, and directed the constructing quartermaster to refuse to transmit any bond not conforming to the requirement of the War Department as to premium. The contractor furnished a bond with the Fidelity & Deposit Co. of Maryland as surety in the sum of $250,000, which bond was required and approved by the contracting officer; and in accordance with the arrangement which had been made by the surety company with the War Department the Fidelity & Deposit Co. of Maryland fixed the premium at 1 per cent, or $2,500, and the plaintiff paid the said sum to said surety company, and subsequently the said sum of $2,500 was paid to the plaintiff by the United States in August, 1917, as a part of the costs of the work. Five hundred or more of such payments were made by the United States to contractors who had cost-plus contracts with the United States.

In January, 1920, in pursuance of a decision of the Comptroller of the Treasury that such premiums on surety bonds were not allowable under cost-plus contracts, said sum of $2,500 was deducted from a sum of money otherwise due the plaintiff, and it has not since been restored or paid to it.

IV.

The plaintiff, during the progress of the work, also paid a premium on the bond required to be given and which was given by Scherich & Mayer, subcontractors. The premium on said bond was $450 or 1 per cent on the amount of the bond. This sum was paid by the United States in August, 1917. It was deducted from a sum of money otherwise due the plaintiff, and it has not since been restored or paid to it. The voucher covering both of these deductions the plaintiff receipted under protest.

V.

Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer, the plaintiff took out policies of insurance of the following character: Public liability insurance, automobile liability insurance, and burglary and holdup insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52. Maj. Dempsey, who on July 16, 1917, had ceased to be the contracting officer, on July 17, 1917, refused to approve the payment of premiums on these policies; but upon full payment of these premiums a voucher for the same was submitted by the plaintiff to the constructing quartermaster at the place of construction and by him transmitted to the War Department. On December 22, 1917, Col. I. W. Littell, the contracting officer, approved the action of the plaintiff in taking out the policies of insurance above referred to and authorized and directed the constructing quartermaster to pay to the plaintiff the sum of $9,114.52, the amount of the premiums paid by it on said policies. The said quartermaster submitted the question of payment of the aforesaid amount to the Comptroller of the Treasury, who decided that the said amount should not be paid to the plaintiff, and said amount has not been paid by the United States to the plaintiff.

29 CONCLUSION OF LAW.

The court, upon the foregoing findings of fact, decides as a conclusion of law that the plaintiff is entitled to recover the sum of $2,500 as found in Finding III; the sum of $450 as found in Finding IV; and the sum of $9,114.52 as found in Finding V. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twelve thousand and sixty-four dollars and fifty-two cents ($12,064.52).

OPINION.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover the sum of $12,064.52. This sum is made up of items which the plaintiff claims it

is entitled to by reason of the fact that the items so claimed shoul have been paid by the defendants under the contract which is base upon the system of cost of construction plus a fee. The contra provides that the plaintiff shall be reimbursed for such of its actu net expenditures in the performance of the work as may be approve or ratified by the contracting officer. For its own services the plai tiff was to receive a fee based upon a sliding scale with a maximu limit.

There is no dispute as to the facts. The plaintiff made the e penditures, but the defendants contend that the bond for pe formance required by Article IX of the contract is not a bond with the discretion of the contracting officer to approve or require, a that the expenditure of $2,500, the premium on the bond, did n fall within the expenditures provided for in Article II of the co tract. It is difficult to understand why the premium on such bo is not a part of the cost of the contract. It had to be given a approved before the contract could take effect; it was a cost whi the contractor was called upon to incur; it was a cost moreover whi the contract itself provided for; it can not be said that it is separa and distinct from the contract, and not a part of it. It was a bo which was required by statute, and before being accepted had to approved by the contracting officer. 33 Stat. 811; 28 Stat. 2 Army Regulations Per. 569.

The bond in this case was required and approved by the contra ing officer; the premium on the bond was paid by the United Stat to the plaintiff in accordance with paragraph h, Article II, of t contract. More than two years after this payment was made the plaintiff it was deducted from money otherwise due the plainti In view of what has been said, and in view of the fact that t United States entered into negotiations with the various surety co panies for the purpose of having them reduce their premiums such bonds before this or any similar contracts were executed, th showing their purpose and intention to pay the cost of such bon the court is of opinion that the premium on this bond is proper payable by the United States under the terms of the contract.

The next item of the claim is the amount of premiums of insura paid by the plaintiff. These premiums were paid by the plaint and such payment was approved by the contracting officer, a
30 having been so approved under Article II of the contract t payment must be allowed.

A judgment in the sum of $12,064.52 will be entered for the pla tiff. It is so ordered.

GRAHAM, *Judge;* DOWNEY, *Judge*, and BOOTH, *Judge*, concur.

CAMPBELL, *Chief Justice*, dissents:

I dissent from the judgment as to the two items involving cost contractor's and subcontractor's bonds.

31 VI. *Judgment of the court.*

At a Court of Claims held in the City of Washington on the eighteenth day of April, A. D. 1921, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the Mason and Hanger Company as aforesaid is entitled to recover and shall have and recover of and from the United States the sum of twelve thousand and sixty-four dollars and fifty-two cents ($12,064.52).

BY THE COURT.

VII. *Proceedings after entry of judgment.*

On June 11, 1921, the defendant filed a motion to amend the court's findings of fact.

On June 13, 1921, the defendant's motion to amend findings of fact was overruled in open court after argument.

VIII. *Defendant's application for and allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the 13th day of June, 1921, in favor of claimant, the defendants, by their Attorney General, on the 28th day of June, 1921, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed June 28, 1921.

Ordered:

That the above appeal be allowed as prayed for.

June 30, 1921.

EDWARD K. CAMPBELL,
Chief Justice.

32 Court of Claims.

MASON & HANGER COMPANY
vs.
UNITED STATES. } No. 34208.

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Hay, J., and dissent by Campbell, Ch. J.; of the judgment of the court; of the defendant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 1st day of July, A. D. 1921.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

(Indorsement on cover:) File No. 28,365, Court of Claims. Term No. 410. The United States, appellant, *vs.* Mason & Hanger Company. Filed July 13th, 1921. File No. 28,365.

○

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922.

No. [redacted] 122

THE UNITED STATES, APPELLANT,

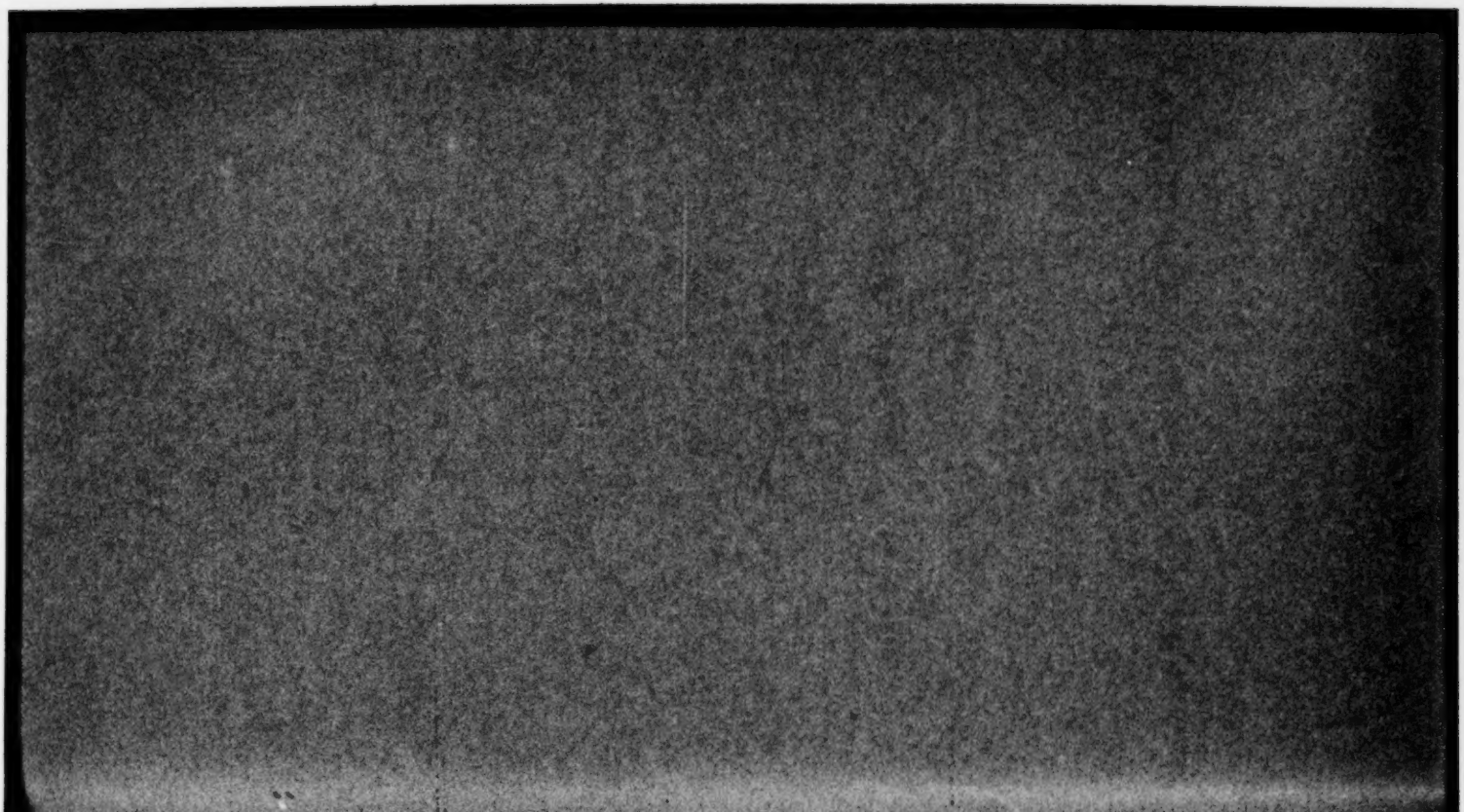
vs.

NORTHEASTERN CONSTRUCTION CO.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 31, 1922.

(28366)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 411.

THE UNITED STATES, APPELLANT,

vs.

NORTHEASTERN CONSTRUCTION CO.

APPEAL FROM THE COURT OF CLAIMS.

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1 *I. Petition and Exhibit "A."*

(Filed Nov. 28, 1919.)

In the Court of Claims.

NORTH-EASTERN CONSTRUCTION COMPANY
v.
THE UNITED STATES. } No. 34229.

PETITION.

To the honorable the Court of Claims:

The claimant, North-Eastern Construction Company, respectfully represents:

I. That it is a corporation organized under the laws of the State of New York with its principal office and place of business in the city of New York in said State.

II. On the 12th day of September, 1918, a contract was signed by it, represented by its president, D. A. Garber, and by the United States of America, represented by R. C. Marshall, jr., brigadier-general, U. S. Army, which contract became effective on its date, whereby the claimant agreed to furnish the necessary labor, material, and so forth, and do all things necessary for the construction and completion of certain barracks buildings at Astoria, Long Island, in the State of New York, on the basis of cost plus a fixed profit or fee for work done. A copy of said contract is hereto attached as Exhibit "A" and made a part thereof.

III. Said contract provided among other things, in Article II, as follows:

2 "Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

* * * * * * *

"(h) Such bonds, fire, public liability, employers' liability, workmen's compensation and other insurance as the contracting officer may approve or require and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the pur-

pose of reimbursement to the contractor but not for the purpose of determining the contractor's fee, except as hereinafter provided."

* * * * * * *

"(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph."

Said contract further provided in Article IX as follows:

"Bond.—The contractor shall, prior to commencing the said work, furnish a bond, with sureties satisfactory to the contracting officer, in the sum of fifteen thousand ($15,000.00) dollars, conditioned upon its full and faithful performance of all the terms, conditions and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor."

3 IV. On entering on the work claimant, through its representatives, procured the surety bond required by Article IX above quoted. Said bond was approved by the contracting officer or his representative.

V. The contractor thereafter paid the actual necessary cost of surety bond so given, amounting to one hundred and fifty dollars ($150.00), and presented a voucher covering such payment to the contracting officer for his approval and payment, and the said sum of one hundred and fifty dollars ($150.00) was upon the approval of the contracting officer duly reimbursed to the contractor. Such payment was made under the following provision of the contract, Article IV:

"Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) the cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to two and one-half per cent (2½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay-rolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments.

4 When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding two

and one-half per cent (2½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof."

VI. The Comptroller of the Treasury later ruled that the form of contract used here and in all other cases of this character did not form a legal basis for the reimbursement to the contractor of cost of premiums on surety bonds. In accordance with this decision, on final settlement of moneys due under this contract the sum of one hundred and fifty dollars ($150.00) was deducted and withheld from moneys due this contractor as reimbursement to the United States of the sum previously paid to claimant for cost of premium on surety bond, as aforesaid. Such deduction was made in the accounts of Captain Nathaniel Dain, Q. M. C., for the month of June, 1919, Voucher No. 44, as follows:

"Premium on Indemnity Bond reimbursed to contractor by constructing quartermaster, which expenditure is not a proper charge against the Government as per ruling of Comptroller of Treasury—dated May 28, 1919.
Amount bond $15,000.00—$150.00."

Claimant refused to agree to said deduction and expressed dissent therefrom by placing thereon the following statement:

"We hereby certify that the above statement represents all outstanding obligations under this contract to the best of our knowledge and belief without admitting that the balance of fee as shown is final; also claim will be made for reimbursement to us of the premium of $150.00 on surety bond."

Claim was therefore presented to the Auditor for the War Department for reimbursement of the $150.00 so withheld and the claim disallowed. On appeal to the Comptroller of the Treasury, the action of the Auditor was affirmed.

VII. Claimant now represents that the bond given as above set forth was obtained with the approval of the contracting officer and by virtue of the contract provision requiring it to be given, and that said contractor made a net expenditure of one hundred and fifty dollars ($150.00) on account thereof, for which it has not been reimbursed.

VIII. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims one hundred and fifty dollars ($150.00).

KING & KING,
Attorneys for Claimant.

6 DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge, information, and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 28th day of November, 1919.

[SEAL.] MAY LOU H. BYINGTON,
Notary Public.

9 In the Court of Claims.

NORTH-EASTERN CONSTRUCTION COMPANY
v.
THE UNITED STATES. } No. 34,229.

EXHIBIT A.

War Department. Construction Division, U. S. A., 4th Ed.—10M 6-18.

Contract for emergency work. Construction of barracks buildings at Astoria, Long Island, New York.

Contract made and concluded this 12th day of September, 1918, by and between North-Eastern Construction Company, of New York, N. Y., a corporation organized under the laws of the State of New York represented by Daniel A. Garber, its president, party of the first part (hereinafter called contractor), and the United States of America, by Brigadier General R. C. Marshall, jr., U. S. A. (hereinafter called contracting officer), acting by authority of the Secretary of War, party of the second part.

Whereas, the Congress having declared by joint resolution approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the
10 work hereinafter described, and it is necessary that said work shall be completed within the shortest possible time; and

Whereas, it is advisable, under the disturbed conditions which exist in the contracting industry throughout the country, for the United States to depart from the usual procedure in the matter of letting contracts, and adopt means that will insure the most expeditious results; and

Whereas, the contractor has had experience in the execution of similar work, has an organization suitable for the performance of

such work, and is ready to undertake the same upon the terms and conditions herein provided;

And, whereas, it is not practicable to do the work hereinafter provided on or under any form of contract other than that which hereinafter follows, nor will circumstances permit the delay in letting this contract until at least three responsible competing contractors shall have been notified and considered in connection with such contract and the awarding of the contract to the lowest bidder.

Now, therefore, this contract witnesseth, that in consideration of the premises and of the payments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the contracting officer as follows:

Article I.

Extent of the work.—The contractor shall, in the shortest possible time, furnish the labor, materials, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work: Barracks buildings at Astoria, Long Island, New York, in accordance with the drawings and specifications to be furnished by the contracting officer, and subject in every detail to his supervision, direction, and instruction.

The contracting officer may, from time to time, by written instructions or drawings issued to the contractor make changes
11 in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of instruction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the contracting officer, all machinery, equipment, hand tools, supplies, and materials, for which the contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. These provisions as to title shall not operate to relieve the contractor from any duties imposed hereby or by the contracting officer.

Article II.

Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

(a) All labor, material, machinery, hand tools not owned by the workmen, supplies and equipment, necessary for either temporary or permanent use for the benefit of said work; but this shall not be con-

strued to cover machinery or equipment mentioned in section (c) of this article. The contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done without the prior consent and approval of the contracting officer.

(b) All sub-contracts made in accordance with the provisions of this agreement.

(c) Rental actually paid by the contractor, at rates not to exceed those mentioned in the schedule of rental rates hereto attached, for construction plant in sound and workable condition, such as
12 pumps, derricks, concrete mixers, boilers, clam-shell or other buckets, electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment as may be necessary for the proper and economical prosecution of the work.

Rental to the contractor for such construction plant or parts thereof as it may own and furnish, at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the site of the work, the contractor shall file with the contracting officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final, unless the contracting officer shall, within five days after the machinery has been set up and is working, modify or change such valuation, in which event the valuation so made by the contracting officer shall be deemed final. When and if the total rental paid to the contractor for any such part shall equal the valuation thereof, no further rental therefor shall be paid to the contractor, and title thereto shall vest in the United States. At the completion of the work, the contracting officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

Rates of rental as substitutes for such scheduled rental rates may be agreed upon in writing between the contractor and the contracting officer, such rates to be in conformity with rates of rental charged in the particular territory in which the work covered by this contract is to be performed. If the contracting officer shall furnish or supply any such equipment, the contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment.

(d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be
13 used in connection with said work, subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use in the said work.

(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor, and expediting the production and transportation of material and equipment.

(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the contractor in connection with said work. In case the full time of any field employee of the contractor is not applied to said work but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

(g) Buildings and equipment required for necessary field offices, commissary, and hospital and the cost of maintaining and operating said offices, commissary, and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

(h) Such bonds, fire, public liability, employers' liability, workmen's compensation, and other insurance as the contracting officer may approve or require and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided.

(i) Permit fees, deposits, royalties, and other similar items
14 of expense incidental to the execution of this contract, and necessarily incurred. Expenditures under this item must be approved in advance by the contracting officer.

(j) Such proportion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the contractor as is actually incurred in connection with this work.

(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer it shall be specifically certified as being allowed under this paragraph.

The United States reserves the right to pay directly to common carriers any or all freight charges on material of all kinds and machinery, furnished under this contract, and certified by the contracting officer as being for installation or for consumption in the course of the work hereunder; the contractor shall be reimbursed for such freight charges of this character as it shall pay and as shall be specifically certified by the contracting officer; but the contractor shall have no fee based on such expenditures. Freight charges paid by the contractor for transportation of construction equipment, construction plant, tools, and supplies of every character shall be treated as part of the cost of the work upon which the contractor's fee shall be based; provided that charges for transportation of such construction equipment, construction plant, and tools over distances in excess

of five hundred miles shall require the special approval of the contracting officer.

No salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

The contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor.

All revenue from the operations of the commissary, hospital or other facilities, or from rebates, refunds, etc., shall be accounted for by the contractor and applied in reduction of the cost of the work.

Article III.

Determination of fee.—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

If the cost of the work is $100,000 or under, a fee of 7% of such cost.

If the cost of the work is over $100,000 and under $125,000, a fee of $7,000.

If the cost of the work is over $125,000 and under $450,000 a fee of 6½%.

If the cost of the work is over $450,000 and under $500,000, a fee of $29,250.

If the cost of the work is over $500,000 and under $1,000,000, a fee of 6%.

If the cost of the work is over $1,000,000 and under $1,100,000, a fee of $60,000.

If the cost of the work is over $1,100,000 and under $1,500,000, a fee of 5½%.

If the cost of the work is over $1,500,000 and under $1,650,000, a fee of $82,500.

If the cost of the work is over $1,650,000 and under $2,200,000, a fee of 5%.

If the cost of the work is over $2,200,000 and under $2,450,000, a fee of $110,000.

If the cost of the work is over $2,450,000 and under $2,850,000, a fee of 4½%.

If the cost of the work is over $2,850,000 and under $3,250,000, a fee of $128,250.

If the cost of the work is over $3,250,000 and under $4,000,000, a fee of 4%.

16 If the cost of the work is over $4,000,000 and under $4,250,000, a fee of $160,000.

If the cost of the work is over $4,250,000 and under $4,775,000, a fee of 3¾%.

If the cost of the work is over $4,775,000 and under $5,175,000, a fee of $179,062.50.

If the cost of the work is over $5,175,000 and under $5,725,000, a fee of 3½%.

If the cost of the work is over $5,725,000 and under $6,225,000, a fee of $200,375.

If the cost of the work is over $6,225,000 and under $6,825,000, a fee of 3¼%.

If the cost of the work is over $6,825,000 and under $7,400,000, a fee of $221,812.50.

If the cost of the work is over $7,400,000 and under $7,750,000, a fee of 3%.

If the cost of the work is over $7,750,000 and under $8,350,000, a fee of $242,000.

If the cost of the work is over $8,350,000 and under $8,800,000, a fee of 2¾%.

If the cost of the work is over $8,800,000 and under $9,650,000, a fee of $242,000.

If the cost of the work is over $9,650,000 and under $10,000,000, a fee of 2½%.

If the cost of the work is over $10,000,000, a fee of $250,000.

Provided, however, that the fee upon such part of the cost of the work as is represented by payments to subcontractors, under subdivision (*b*) of Article II hereof, shall in each of the above contingencies be two and one-half per cent (2½%) and no more of the amount of such part of the cost.

The cost of materials purchased or furnished by the contracting officer for said work, exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the contractor, but for no other purpose.

The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof—not exceeding seven per cent (7%)—as the contracting officer may determine.

17 The total fee to the contractor hereunder shall in no event exceed the sum of nine thousand five hundred ($9,500.00) dollars, anything in this agreement to the contrary notwithstanding.

Article IV.

Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) The cost of the work up to and includ-

ing the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to two and one-half per cent (2½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding two and one-half per cent (2½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The contracting officer may also make payments at more frequent intervals
for the purpose of enabling the contractor to take advantage
18 of discounts at intervals between the dates above mentioned or
for other lawful purposes. Upon final completion of said work the contracting officer shall pay to the contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

Article V.

Inspection and audit.—The contracting officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, to the work and material, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to said work; and the contractor shall preserve for a period of two years after its completion or cessation of work under this contract all the books, records, and other papers just mentioned. Any duly authorized representative of the contractor shall be accorded the privilege of examining the books, records, and papers of the contracting officer relating to said work for the purpose of checking up and verifying the cost of said work. The system of accounting to be employed by the contractor shall be such as is satisfactory to the contracting officer.

If at any time the contracting officer shall find that bills for labor, material, or other bills legitimately incurred by the contractor hereunder are not promptly paid by the contractor, the contracting officer

may, in his discretion, refuse to make further payments to the contractor until all such obligations past due shall have been paid. Should the contractor neglect or refuse to pay such bills within five days after notice from the contracting officer so to do, then the contracting officer shall have the right to pay such bills directly, in which event such direct payment shall not be included in the cost of the work.

19

Article VI.

Special requirements.—The contractor hereby agrees that it will:

(a) Begin the work herein specified at the earliest time practicable, and diligently proceed so that such work may be completed at the earliest possible date.

(b) Promptly pay for all labor, material, or other service rendered.

(c) Procure and thereafter maintain such insurance in such forms and in such amounts and for such periods of time as the contracting officer may approve or require.

(d) Procure all necessary permits and licenses, and obey and abide by all laws, regulations, ordinances, and other rules applying to such work, of the United States of America, of the State or Territory wherein such work is done, of any subdivision thereof, or of any duly constituted public authority.

(e) Unless this provision is waived by the contracting officer, insert in every contract made by it for the furnishing to it of services, materials, supplies, machinery, and equipment, or the use thereof, for the purposes of the work hereunder, a provision that such contract is assignable to the United States; will make all such contracts in its own name, and will not bind or purport to bind the United States or the contracting officer thereunder.

(f) In every subcontract made in accordance with the provisions hereof, require the subcontractor to agree to comply fully with all the undertakings and obligations of the contractor herein, excepting such as do not apply to such subcontractor's work.

(g) At all times keep at the site of the work a duly appointed representative, who shall receive and execute on the part of the contractor such notices, directions, and instructions as the contracting officer may desire to give.

(h) At all times use its best efforts in all its acts hereunder to protect and subserve the interest of the coning officer and the United States.

20

Article VII.

Right to terminate contract.—[Omitted from printing as irrelevant to the present case.]

Article VIII.

Abandonment of work by contracting officer.—[Omitted from printing as irrelevant to the present case.]

Article IX.

Bond.—The contractor shall, prior to commencing the said work, furnish a bond, with sureties satisfactory to the contracting officer, in the sum of fifteen thousand ($15,000.00) dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor.

Article X.

Convict labor.—[Omitted from printing as irrelevant to the present case.]

Article XI.

Hours and conditions of labor.—[Omitted from printing as irrelevant to the present case.]

Article XII.

Right to transfer or sublet.—Neither this contract, nor any interest therein, shall be assigned or transferred. The contractor shall not enter into any subcontract for any part of the work herein specified without the consent and approval in writing of the contracting officer. In case of such assignment, transfer, or subletting without the consent and approval, in writing, of the contracting office, the contracting officer may refuse to carry out this contract either with the transferror or transferee, but all rights of action for any breach of this contract by the contractor are reserved to the United States.

21

Article XIII.

No participation in profits by Government officials.—[Omitted from printing as irrelevant to the present case.]

Article XIV.

Settlement of disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider itself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of the Construction Division of the Army for determination. If, however, the contractor shall feel aggrieved by the decision of that officer, it shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

Article XV.

This contract shall bind and inure to the contractor and its successors.

It is understood and agreed that wherever the words "Contracting officer" are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War, and any duly appointed representative of the contracting officer.

Witness the hands of the parties hereto the day and year first above written, all in triplicate.

NORTH-EASTERN CONSTRUCTION CO.,
By D. A. GARBER, *President.*

Witnesses:
(1) JOHN J. MURPHY.
(2) C. A. MILLER.

22

UNITED STATES OF AMERICA.
By R. C. MARSHALL, Jr.,
Brigadier General, U. S. A.,
Contracting Officer.

Witnesses:
(1) M. J. SWAYZEE.
(2) G. C. MEYER.

Schedule of rental rates.

[Omitted from printing as irrelevant to the present case.]

23

II. History of proceedings.

On January 27, 1920, the defendant filed a demurrer to the plaintiff's petition.

On February 24, 1920, the demurrer was argued by John E. Hoover, Esq., for the defendant, and by George A. King, Esq., for plaintiff, and submitted.

On March 1, 1920, the demurrer was overruled by the court without prejudice.

III. Argument and submission of case.

On April 4, 1921, this case was argued and submitted by George A. King, Esq., for plaintiff, and by John E. Hoover, Esq., for defendant.

IV. Findings of fact and conclusion of law.

(Entered April 18, 1921.)

This case having been heard by the Court of Claims the Court, upon the evidence, makes the following

FINDINGS OF FACT.

I. The plaintiff, a corporation organized under the laws of the State of New York, entered into a contract in writing with the United States on September 12, 1918, for the construction of buildings and other facilities at Astoria, Long Island, New York. A copy of said contract is attached to the petition of the plaintiff as Exhibit A, and is made a part hereof by reference.

II. The plaintiff furnished a bond, satisfactory to the contracting officer, in the sum of $15,000. Said bond was given by the plaintiff with the National Surety Company of New York as surety.

III. Before this contract, or any other contract for construction for war purposes, was signed, negotiations were entered into between the War Department and the various surety companies, as to the
24 premium to be charged by surety companies on bonds, the Secretary of War having directed that such premiums should be treated as part of the cost of the work. As the result of these negotiations the surety companies agreed to charge a premium of one per cent upon the penalty of the bond, their premium theretofore having been two per cent on the amount of work involved.

In accordance with this arrangement the premium of the National Surety Company of New York for underwriting this bond was fixed at $150.00, one per cent of the penalty of the bond. The plaintiff paid the premium to the surety company. Subsequently the amount of said premium was paid to the plaintiff by the United States. Five hundred or more of such payments were made by the United States to contractors, who had cost plus contracts with the United States.

Upon making final payment under this contract June 24, 1919, the amount of the premium so paid was deducted from a balance otherwise due plaintiff and it has not been restored or repaid to it. The amount so paid was accepted under protest and with notice that claim would be made for reimbursement for the amount of said premium.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court decides as a conclusion of law that the plaintiff is entitled to recover. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one hundred and fifty dollars ($150).

Campbell, Chief Justice, dissents.

(See case of Mason & Hanger, No. 34208, decided April 18, 1921.)

V. Judgment of the court.

At a Court of Claims held in the city of Washington on the 18th day of April, A. D. 1921, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the North-

eastern Construction Company, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of one hundred and fifty dollars ($150).

BY THE COURT.

25 *VI. Opinion of the court in the case of Mason & Hanger, No. 34208, referred to.*

OPINION.

HAY, Judge, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover the sum of $12,064.52. This sum is made up of items which the plaintiff claims it is entitled to by reason of the fact that the items so claimed should have been paid by the defendants under the contract which is based upon the system of cost of construction plus a fee. The contract provides that the plaintiff shall be reimbursed for such of its actual net expenditures in the performance of the work as may be approved or ratified by the contracting officer. For its own services the plaintiff was to receive a fee based upon a sliding scale with a maximum limit.

There is no dispute as to the facts. The plaintiff made the expenditures, but the defendants contend that the bond for performance required by Article IX of the contract is not a bond within the discretion of the contracting officer to approve or require, and that the expenditure of $2,500, the premium on the bond, did not fall within the expenditures provided for in Article II of the contract. It is difficult to understand why the premium on such bond is not a part of the cost of the contract. It had to be given and approved before the contract could take effect; it was a cost which the contractor was called upon to incur; it was a cost moreover which the contract itself provided for; it can not be said that it is separate and distinct from the contract, and not a part of it. It was a bond which was required by statute, and before being accepted had to be approved by the contracting officer. 33 Stat. 811; 28 Stat. 279. Army Regulations Par. 569.

The bond in this case was required and approved by the contracting officer; the premium on the bond was paid by the United States to the plaintiff in accordance with paragraph h, Article II, of the contract. More than two years after this payment was made to the plaintiff it was deducted from money otherwise due the plaintiff. In view of what has been said, and in view of the fact that the United States entered into negotiations with the various surety companies for the purpose of having them reduce their premiums on such bonds before this or any similar contracts were executed, thus showing their purpose and intention to pay the cost of such bonds, the court is of opinion that the premium on this bond is properly payable by the United States under the terms of the contract.

The next item of the claim is the amount of premiums of insurance paid by the plaintiff. These premiums were paid by the plaintiff,

and such payment was approved by the contracting officer, and
26 having been so approved under Article II of the contract the payment must be allowed.

A judgment in the sum of $12,064.52 will be entered for the plaintiff. It is so ordered.

Graham, judge; Downey, judge; and Booth, judge, concur.

Campbell, Chief Justice, dissents:

I dissent from the judgment as to the two items involving cost of contractor's and subcontractor's bonds.

27 *VII. Defendants' application for and the allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the 18th day of April, 1921, in favor of the claimant, the defendants, by their Attorney General, on the 28th day of June, 1921, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed June 28, 1921.

Ordered: That the above appeal be allowed as prayed for.

EDW. K. CAMPBELL,
Chief Justice.

June 30, 1921.

Court of Claims.

NORTH-EASTERN CONSTRUCTION CO.
vs.
UNITED STATES. } No. 34229.

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the opinion of the court in the case of Mason & Hanger, No. 34208, referred to; of the judgment of the court; of the defendants' application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this fifth day of July, A. D. 1921.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 28366. Court of Claims. Term No. 411. The United States, appellant, *vs.* North-Eastern Construction Company. Filed July 13th, 1921. File No. 28366.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES, APPELLANT, v. MASON & HANGER CO. — No. 121.

THE UNITED STATES, APPELLANT, v. NORTHEASTERN CONSTRUCTION CO. — No. 122.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These are appeals by the United States from judgments of the Court of Claims awarding to the appellees amounts found to be due them under cost-plus contracts for the construction of certain buildings at Camp Zachary Taylor, near Louisville, Ky., and at Astoria, Long Island, respectively. The only point raised by the United States in this court is common to both cases and the facts, so far as they apply to the point raised, are identical.

The amount of the judgment in the Mason & Hanger case is $12,064.42. Of this amount $9,114.52 represents amounts paid by the contractor as premiums upon policies of public liability, automobile liability, burglary and hold-up insurance, taken out in connection with the work, and $450 is the amount of a premium paid by the contractor upon a bond given by one of its subcontractors. Upon this appeal the United States does not question the allowance of these amounts by the Court of Claims.

The balance—$2,500—represents the premium paid by the contractor upon a bond in the amount of $250,000 given by the contractor prior to commencing work under the contract, a bond required by the act of February 24, 1905 (33 Stat. 811, Comp. Stat., sec. 6923) to be given in such cases as a condition precedent to beginning the work under the contract. The United States claims that under the contract it is not required to reimburse the contractor for this item of expense.

The amount of the judgment in the Northeastern Construction Co. case is $150 and represents the premium paid by the contractor upon a similar bond in the sum of $15,000 under similar conditions.

THE MASON & HANGER CASE.

The contract in the Mason & Hanger case was signed between the contractor and the United States on June 20, 1917. Under this contract the contractor agreed to furnish labor and materials for the construction and completion of certain buildings and

utilities at Camp Zachary Taylor on the basis of cost, plus a fixed profit for the work done.

A copy of the contract is attached to the petition, marked "Exhibit A," and is set forth beginning at page 5.* The controversy arises out of the construction of Article II of this contract. Article II provides "that the contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items." Then follows 11 items which may be summarized briefly as:

(*a*) Labor, material, machinery, etc.

(*b*) All subcontracts made in accordance with the provisions of this agreement.

(*c*) Rental.

(*d*) Loading and unloading construction plant.

(*e*) Transportation.

(*f*) Salaries.

(*g*) Buildings and equipment.

(*h*) [The particular item herein involved and therefore quoted in full as follows:]

"Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the

* The page references are to the record in the Mason & Hanger case unless otherwise indicated.

written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided." (P. 8.)

(*i*) Permit fees, deposits, royalties, etc.

(*j*) A proportion of transportation, traveling, and hotel expenses of officers, engineers, and other employees of the contractor.

(*k*) "Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph."

[Paragraph "K" contains the further provision that "No overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work."]

Article IX of the contract is as follows (p. 13):

> *Bond.*—The contractor shall, prior to commencing the said work, furnish a bond, with sureties satisfactory to the contracting officer, in the sum of two hundred and fifty thousand ($250,000.00) dollars, conditioned upon its full and faithful performance of all the terms,

conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor.

Article XIV of the contract is as follows (p. 14):

> *Settlement of disputes.*—This contract shall be interpreted as a whole, and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination. If, however, the contractor shall feel aggrieved by the decision of the officer in charge of cantonment construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

The third finding of fact made by the Court of Claims is as follows (p. 18):

> Before this contract, or any other contract for cantonments or other construction for war purposes, was signed, negotiations were entered into between the War Department and the various surety companies as to the premium to be charged on bonds, the Secretary of War having directed that such premiums should be treated as part of the cost of the work. As the result of these negotiations the

surety companies agreed to charge a premium of 1 per cent upon the penalty of the bond, their premium theretofore having been 2 per cent on the amount of work involved.

The War Department decided to fix the bond for the construction of each of the 16 cantonments for the National Army under the cost-plus system at $250,000. The contract of the plaintiff was to construct one of these contonments, and its bond was fixed at $250,000.

Colonel Littell, in charge of cantonment construction, notified both the plaintiff and the contracting officer that the rate had been fixed at 1 per cent, and directed the constructing quartermaster to refuse to transmit any bond not conforming to the requirement of the War Department as to premium. The contractor furnished a bond with the Fidelity & Deposit Co. of Maryland as surety in the sum of $250,000, which bond was required and approved by the contracting officer; and in accordance with the arrangement which had been made by the surety company with the War Department the Fidelity & Deposit Co. of Maryland fixed the premium at 1 per cent, or $2,500, and the plaintiff paid the said sum to said surety company, and subsequently the said sum of $2,500 was paid to the plaintiff by the United States in August, 1917, as a part of the costs of the work. Five hundred or more of such payments were made by the United States to contractors who had cost-plus contracts with the United States.

> In January, 1920, in pursuance of a decision of the Comptroller of the Treasury that such premiums on surety bonds were not allowable under cost-plus contracts, said sum of $2,500 was deducted from a sum of money otherwise due the plaintiff, and it has not since been restored or paid to it.

Substantially the same finding was made in the Northeastern Construction Co. case (p. 14 of record in that case).

The able opinion of the Comptroller of the Treasury (26 Dec. Comp. Treas. 374), omitting the preliminary statement of facts and the quoted provisions of the contract, is printed as an appendix hereto.

THE NORTHEASTERN CONSTRUCTION CASE.

The contract in the Northeastern Construction Co. case was made on the 12th day of September, 1918. Under this contract the contractor agreed to furnish labor and materials for the construction and completion of certain barracks buildings at Astoria, Long Island. The form of the contract is the same as that in the Mason & Hanger case, and the provisions, in so far as they affect the question under consideration, are identical.

The opinion of the Court of Claims was given in the Mason & Hanger case and was adopted by that court in the Northeastern Construction Co. case. (Northeastern Construction Co. record, p. 14.) Chief Justice Campbell dissented in each case.

The claim made by the United States in each case is that the premium upon the bond given by the con-

tractor was not one of the items of cost which the United States was required by the contract to pay.

ARGUMENT.

These contracts were obviously drawn upon a form prepared with care for general use of the War Department in making war contracts. Apparently about 500 similar contracts were made, for the Court of Claims tells us that 500 or more similar payments were made. (Third finding, *supra.*) The language is not obscure, imperfect, ambiguous, or inartificial. Therefore there is no need to look beyond the language itself in order to ascertain and declare its meaning.

> *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272.

"The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

> *United States* v. *Gleason*, 175 U. S. 588, 606.

The provision of the contract covering the items of the cost of the work for which the contractor would be reimbursed are contained in Article II, and in that article only. The article begins:

> Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures *in the performance of said work* as may be *approved* or *ratified* by the contracting officer and *as are included in the following items.* (Italics ours.)

Then follow eleven paragraphs designated (*a*) to (*k*), inclusive. The opinion of the Court of Claims is inaccurate in stating that the "contract provides that the plaintiff shall be reimbursed for such of its actual net expenditures in the performance of the work as may be approved or ratified by the contracting officer" (p. 20). There was an additional requirement. They must be expenditures included in one of the items (*a*) to (*k*).

Every item of expenditure, therefore, for which the Government was to reimburse the contractor must comply with *all* of the following conditions:

(*a*) It must have been expended "in the performance of said work."

(*b*) It must have been approved or ratified by the contracting officer.

(*c*) It must be included in one of the items set forth in the subdivisions of Article II.

(a) The cost of the contract bond was not incurred "in the performance of the work."

It was incurred before the work began and as a condition precedent to the commencement of the work in accordance with the act of February 24, 1905 (33 Stat. 811; Comp. Stat. sec. 6923), which provides:

> That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be re-

> quired, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; * * *.

The United States was to pay for performing the work, not for qualifying the contractor. It was not to pay all the expenses incurred by the contractor in, about, or in connection with the work. It was not to pay salaries of executive officers, expenses of the contractor's main or regularly established branch offices, interest on capital or borrowed money, or general overhead (p. 8), but only "such" expenses "in the performance of the work" as were enumerated.

(b) The bond upon which this premium was paid was not "such" a bond "as the contracting officer may approve or require" within the meaning of the contract.

Item (*h*) already quoted in full begins:

> Such bonds, fire, liability, and other insurance as the contracting officer may approve or require.

This language implies the exercise of discretion by the contracting officer, and separates bonds and insurance policies into two classes; those which he might require or approve, and those which he might not require or approve. When read in connection

with the language in the first paragraph of Article II, "in the performance of the work," it would seem to be clear that the contracting parties foresaw that during the progress of the work it might become expedient or even necessary for the contractor to give or require bonds, or to take out insurance of various kinds, and if such bonds or insurance policies were required or approved by the contracting officer, they become part of the cost which the Government was to assume. If, however, the contractor saw fit to procure bonds or insurance policies, which, however reasonable or proper they might be, the contracting officer did not require or choose to approve, the expense must be borne by the contractor. The contracting officer had a discretion, and according to his way of exercising it the Government reimbursed or did not reimburse the contractor. The bond in question, however, was not of this kind. Neither the contractor nor the contracting officer had any choice in the matter. An act of Congress had taken away all discretion. That statute, not the will of the contracting officer, "required" the bond. A bond would have been necessary even though the contract had contained no provision for it. The Secretary of War fixed the amount of the bond and the contracting officer merely saw to it that the sureties were satisfactory. Article IX does not require that the bond should be approved by the contracting officer. It says merely that the "sureties" shall be "satisfactory to the contracting officer."

The finding of the Court of Claims that the bond was required and approved by the contracting officer is, therefore, immaterial.

The Comptroller of the Treasury says in his decision (26 Dec. Comp. Treas. 378), "The bond itself shows no approval or other action by the contracting officer such as would have been necessary as to a bond under item (*h*)."

(c) The bond was not included in one of the items set forth in the subdivisions of Article II of the contract.

In addition to being an expense incurred in the performance of the work and one which the contracting officer had discretion to approve or not, the expense must be one included in the items of Article II, designated (*a*) to (*k*), inclusive. The bond in question was given under Article IX. What has already been said becomes clearer when we examine the various subdivisions of Article II. They all relate to matters of costs incurred *during the actual performance of the work*. The language of paragraph (*h*) is:

> * * * Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been sustained, etc.

are made costs of the work.

The word "bonds" in connection with fire, liability, and other insurance followed by a provision making

such losses and expenses as were not compensated by insurance or "otherwise" part of the cost which the United States was to pay, shows clearly that the matter referred to in the subdivision was the matter of indemnity for losses and expenses which might be sustained during the completion of the contract.

The Government was to reimburse the contractor for losses and expenses if they resulted from causes other than his fault or neglect and were not compensated by insurance "or otherwise." Hence, indemnity against such losses was a matter of concern to the Government, and the desirability of obtaining bonds or other form of indemnity was a proper matter for the discretion of the contracting officer. The word "insurance" is the appropriate word to cover losses under insurance policies and the word "otherwise" would seem fairly to refer to losses covered by bonds; as, for instance, a bond given by some officer or employee of the company handling money for the pay roll or a bond required of some subcontractor or other person doing some portion of the work for the contractor. Looked at in this way, the provisions of paragraph (k) have a clear and reasonable meaning. But there is nothing in the language that suggests that the bond mentioned in Article IX was intended to be included as one of the expenditures in the performance of the work. That was a bond for the protection of the United States and of persons to whom the contractor might become indebted, and if it was forfeited it

would be through the fault or neglect of the contractor and in that aspect would be wholly foreign to the purposes clearly indicated by paragraph (*h*).

This reasoning is confirmed by a reading of Article VI of the contract (p. 11), by which the contractor agrees to do certain things, among them to:

> (*c*) Procure and thereafter maintain such insurance in such forms and in such amounts, and for such periods of time as the contracting officer may approve or require.

This was the indemnity which the contracting officer might "approve or require," for which the Government was to pay under item (*h*) of Article II.

So the cost of this bond was not included in one of the items of expense; it was not "required" by the contracting officer and his approval was immaterial; and it was not incurred in the performance of the work. It would seem, therefore, that it was not a valid charge against the United States.

But the Court of Claims has found that the Secretary of War directed that such premiums should be treated as part of the cost of the work, and 500 such items were paid by the War Department.

If the Secretary of War so directed, and the finding of the Court of Claims is, of course, conclusive, it seems strange that a matter of so much importance should not have been specifically mentioned in these contracts, and even if he did so direct, the rights and obligations of the parties are those and only those expressed in their carefully prepared contract. If,

in addition to "such" enumerated expenses incurred in the performance of the work as should be "approved" by the contracting officer, it was the wish of the Secretary of War that expenses incurred before the work began, and made by act of Congress, a condition precedent to beginning the work, should be paid by the United States, there would have been no difficulty whatever in expressing it. While setting forth minutely and clearly, and in much detail the other items of expense, this item is conspicuously omitted, and "the expression of one is the exclusion of another."

> "Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument."
>
> *Tucker* v. *Alexandroff*, 183 U. S. 424, 436, quoting Lord Denham in *Aspdin* v. *Austin*, 5 Q. B. 671, 684.

The fact that the War Department paid these premiums in the first instance of course shows that in the opinion of the officers of that department it was a proper charge, but their decision is not final or binding upon the United States.

If the meaning of the contract is "clear in the eye of the law, the error of the parties can not control its effect."

Phila., W. & B. R. Co. v. *Trimble*, 10 Wall. 367.

As a general rule, and on grounds of public policy, the Government can not be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made. *Whiteside* v. *United States*, 93 U. S. 247, *Hawkins* v. *United States* 96 U. S. 689, and cases before cited. The question is not presented as between the Government and its officer, or between the officer and the recipient of such payments, but as between the Government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of action not authorized by law, resulting from an erroneous conclusion by the agent of the Government as to the legal effect of the particular statutory law under or in reference to which he is proceeding.

Wisconsin Central R. Co. v. *United States*, 164 U. S. 190, 210.

Article IV of the contract provided for monthly statements of the work, and if there were any items entering into such statements *upon which the contractor and the contracting officer could not agree*, the decision of the contracting officer as to such item should govern (p. 10). The statements so made and the payments made thereon were to be final and binding upon both parties except as provided in

Article XIV. Article XIV authorized the contractor to submit to the officer in charge of the construction division of the Army and the Secretary of War for determination decisions of the contracting officer deemed *prejudicial to the contractor* (p. 14). There is no express provision for a decision where the Government was found by the proper officer to be prejudiced by the decision of the contracting officer. These provisions relate only to matters about which there was a dispute, and there was no dispute here. The contractor wished to be reimbursed and the Army officers were willing that should be done.

The only protection which the Government had against erroneous decisions of the contracting officer resulting in unlawful payments to a contractor was that afforded, as in the present case, by the accounting officers of the Treasury. *Neither a contracting officer nor any other officer of the Government could deprive the Comptroller of the Treasury of his statutory power and duty to see that no money was paid from the Treasury except such as the United States was legally bound to pay.* Nor could any contract lawfully be made which would have that effect. Such is the reasoning of the comptroller in his opinion. If the contract, when properly interpreted, did not give the contractor the right to be reimbursed for the premium on this bond, it was the duty of the comptroller so to declare. That is the purpose for which his office exists. Neither he nor the courts can be deprived of their duty and power to decide questions of law arising

upon a written agreement, even though the Army officers, who are generally not learned in the law, may be willing to acquiesce in the payment.

Money can not be drawn from the Treasury of the United States by the simple process of unanimous consent or acquiescence. No contracting officer can make his determination of the legality of disbursements final and conclusive upon the accounting officers of the Treasury or upon the courts. If it were otherwise, the powers of the comptroller would, as he expresses it, "soon decline to merely verifying computations on vouchers," and the function of the court would be to enter judgment in accordance with the decisions of administrative officers.

The court is not unmindful of the fact that these cases and other claims arising under similar circumstances present a question of importance in the final adjustments and settlements growing out of the cost-plus system of contracts, under which a large part of the war work was done. Whether that system was economically sound or not, it was certainly tremendously expensive for the Government, and in many cases enormously and unconscionably profitable to the contractors. In finally settling the vast cost of the war, while the contractor is entitled to all that the Government agreed to pay, even in unconscionable cases to his pound of flesh, nevertheless it is respectfully submitted that the hundreds of millions of inevitable cost-plus liability should not be increased by one dollar not "nominated in the bond."

CONCLUSION.

The United States contends upon this appeal that the decision of the comptroller was right, and the judgments of the Court of Claims, in so far as they relate to the premium upon these bonds, should be reversed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
NOVEMBER, 1922.

APPENDIX.

OPINION OF THE COMPTROLLER OF THE TREASURY, RENDERED IN THE CASE OF THE NORTHEASTERN CONSTRUCTION CO., OMITTING THE PRELIMINARY STATEMENT OF FACTS AND THE QUOTATIONS FROM THE CONTRACT.

* * * * *

Article IV of the contract provided for monthly statements of the work upon which payments should be made and that "the statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof." Article XIV authorized the contractor to submit to the officer in charge of the construction division of the Army and the Secretary of War, respectively, for determination, decisions of the contracting officer the contractor deemed prejudicial to it. There was no express provision for a decision where the Government was found by the proper examining officers to be prejudiced by the decision of the contracting officer.

During the progress of the work the contractor was reimbursed $150 premium paid on the bond required by Article IX, but in the final statement of the account under the contract (voucher No. 44, June, 1919, accounts of Capt. Nathaniel Dain, Quartermaster Corps), the amount was charged back to the contractor in an item stated as follows:

> "Premium on indemnity bond reimbursed to contractor by constructing quartermaster, which expenditure is not a proper charge against the Government as per ruling of Comptroller of Treasury, dated May 28, 1919. Amount bond, $15,000—$150."

The voucher contained the customary certificate of the payee that the amount was correct, but across its face appeared a statement as follows:

> "We hereby certify that the above statement represents all outstanding obligations under this contract to the best of our knowledge and belief without admitting that the balance of fee as shown is final; also claim will be made for reimbursement to us of the premium of $150 on surety bond."

What is the effect of this general statement of not admitting the finality of the account, the purpose of the account being to make a final one, need not be determined here. The proper procedure should have been for the disbursing officer to make no payment if the payee declined to accept the final statement of the account and claim could then have been filed with the auditor where the account would have been settled, including the premium item. However, the specific reservation of the premium item excepted it from the finality of the account. *Wm. Cramp & Sons* v. *United States*, 216 U. S. 494.

The purpose of Article II of the contract must have been that the contractor should be reimbursed for those items only that are within the provisions of that article and that items not therein provided for are excluded from reimbursement. It must be understood as definitely setting out the items for reimbursement so that reimbursements should not be

matters of interpretation under the general terms of the contract.

In no one of the respective lettered items of Article II is the cost of the bond under Article IX specifically named. Making the purpose of Article II as intending to definitely name the reimbursable items the omission to specifically name an item elsewhere expressly required is significant.

It is urged that the bond required by Article IX is within item (*h*) of Article II as a bond to be approved or required by the contracting officer, and that in fact it is the surety bond which is within its provisions; also that under the stipulations of Articles IV and XIV of the contract the payment of the premium was for the contracting officer to decide and his decision was final and conclusive upon all.

It is clear that the bonds which item (*h*) of Article II required should be a part of the cost of the work must be of the character described in that item and that the bond for performance of the contract stipulated for by Article IX is not of that character. It is a bond necessary to make the contract effective and not one as to which the contracting officer had any discretion. It was not a bond to be approved or required by the contracting officer, but only the sureties were to be satisfactory to him. The bond itself shows no approval or other action by the contracting officer such as would have been necessary as to a bond under item (*h*). The ordinary reading of this item as to what the contracting officer "may approve or require" limits it to the words immediately in context, "other insurance," but whether so limited or connected with the bonds and other forms of insurance there mentioned, its terms do not bring within its provisions the bond stipulated for by Arti-

cle IX. The various other items stipulated for under Article II as cost of the work are not such as embrace the cost of the bond referred to.

It is to be noted that Article XIV requires the bond to be given "prior to commencing the said work," while Article II refers to reimbursement for expenditures "in the performance of said work."

Whether the cost of the bond is to be allowed is a question for the determination of this office under its general authority to determine the amount due upon a claim and no stipulations of the contract, such as appear in Article IV for monthly statements of the work upon which payments shall be made and their finality, can deny to the accounting officers of the Treasury their statutory right to determine the legality of a payment with respect to the use of an appropriation. I construe such provisions of a contract as not intending any such purpose, but as relating wholly to the administrative officers of the executive department making the contract, and whatever is final and binding under such terms is as to those administrative officers and not as to the accounting officers of the Treasury. No branch of the Government can legally deprive, nor should its action be interpreted as intending to deprive, another branch of the Government of its statutory powers. At any rate I think it clear that a contracting officer can not legally contract for a determination of the legality of disbursements and make such a determination final and conclusive upon the accounting officers of the Treasury.

Such contract provisions at best can operate only upon such things as are within the contract and not as making legal interpretations, which are for the law officers of the Government or the courts. If the

contrary maintained, the statutory powers of the accounting officers of the Treasury would soon decline to merely verifying computations on vouchers.

This office has heretofore ruled, 25 Comp. Dec. 300, that every expense incurred by a contractor is not necessarily a cost of the work under a contract and that the premium on a bond for the performance of a contract is not in itself such a cost.

There are no facts in the present case which make this bond properly an expense to be paid by the United States, and as stated no term of the contract can be construed as imposing that liability.

The action of the auditor is affirmed.

○

Supreme Court of the United States.

October Term, 1933

No. 121.

THE UNITED STATES, *Appellant*,

v.

MASON AND HANGER COMPANY

No. 122.

THE UNITED STATES, *Appellant*,

v.

NORTHEASTERN CONSTRUCTION COMPANY

Appeals from the Court of Claims.

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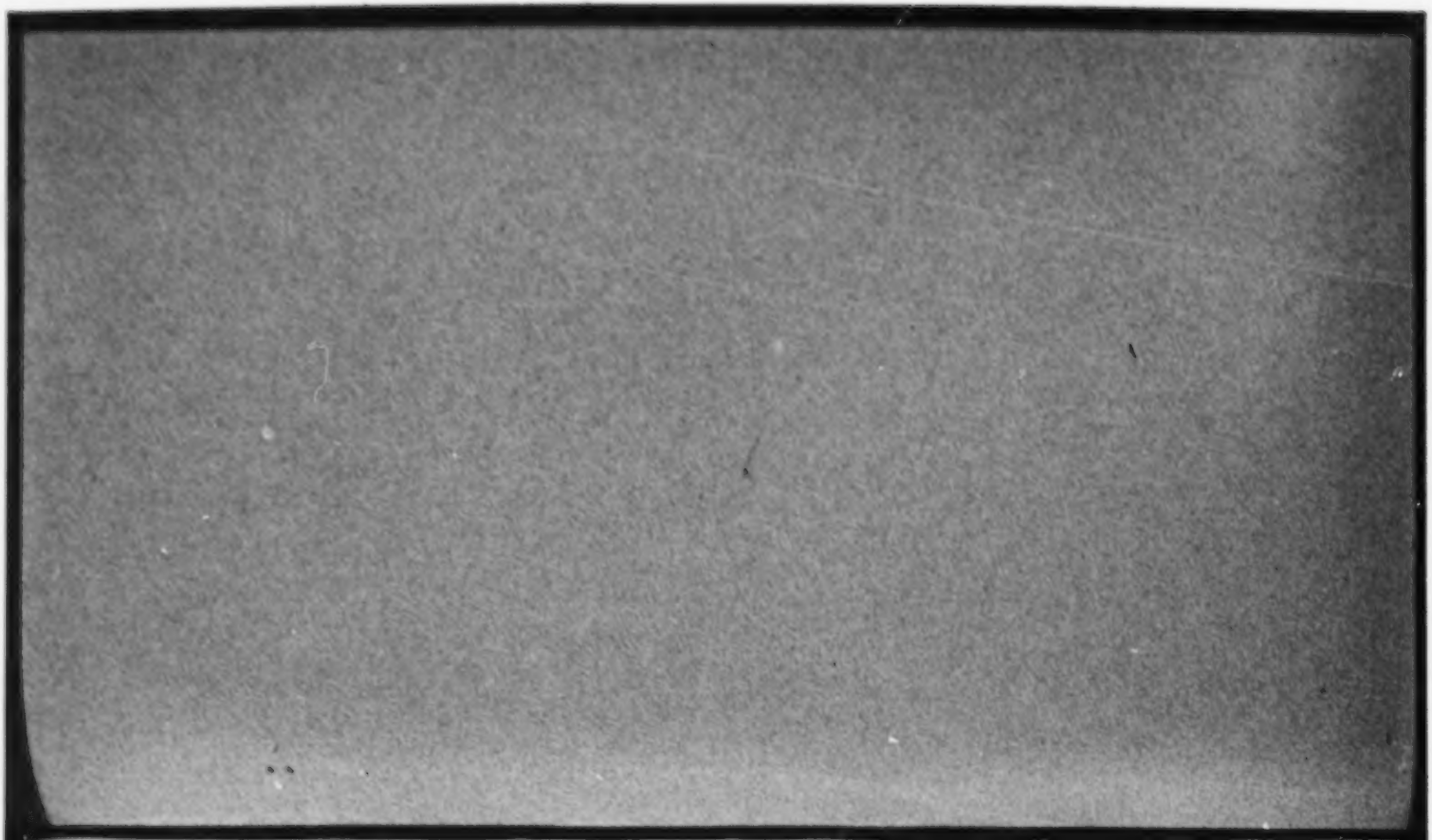

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Supreme Court of the United States

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THE UNITED STATES, *Appellant*,
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MASON AND HANGER COMPANY. } No. 121.

THE UNITED STATES, *Appellant*,
v.
NORTHEASTERN CONSTRUCTION CO. } No. 122.

Appeals from the Court of Claims.

BRIEF FOR APPELLEES.

I. STATEMENT OF THE CASES.

The statement in brief for the United States (pp. 1 to 8) taken in connection with the contracts (record, *Mason & Hanger*, No. 121, pp. 5-15; record, *Northeastern Construction Co.*, No. 122, pp. 4–13), and the findings of fact (record, *Mason & Hanger*, No. 121, pp. 17 to 19; record, *Northeastern Construction Co.*, No. 122, p. 14), sufficiently state the facts.

The Court of Claims gave judgment in favor of the claimants in the case of *Mason & Hanger Company*, No. 121, for the full amount claimed consisting of three items as follows:

1. Premium on bond of $250,000 given by the contractor to the United States for fulfillment of the contract	$2,500
(Finding III, Rec. p. 18.)	
2. Premium on bond given by the subcontractor to the principal contractor (claimant in this case) for fulfillment of the subcontract	450
(Finding IV, Rec. top p. 19.)	
3. Premiums on policies of public liability insurance, automobile liability insurance, and burglary and holdup insurance	9,114.52
(Finding V, Rec. middle p. 19.)	
	$12,064.52

The case of the *Northeastern Construction Company*, No. 122, involves only a premium on the surety bond given by the main contractor for the performance of the contract and is similar to item 1 of the *Mason & Hanger* case, and amounts to $150, for which judgment was entered (Rec. #122, p. 14).

The opinion in *Mason & Hanger* is by Judge Hay and is reported 56 C. Cls. 238.

The United States does not question the allowance of items 2 and 3 of the *Mason & Hanger* case. The only error alleged is as to the allowance of item 1 of the *Mason & Hanger* case and of the entire amount in that of the *Northeastern Construction Company* (brief for the United States, p. 2).

References throughout this brief, as in the brief for the United States, will be to the *Mason and Hanger* record, No. 121, unless otherwise stated.

II. Brief of Argument.

A Cost Plus Contract.

The contract was of a character little used prior to the declaration of war with Germany, April 6, 1917.

By this form of contract the contractor has before him at the time of signing the contract neither drawings nor specifications, all of which are to be furnished in the future. (See this contract, Rec. one-third down p. 6.) Neither is there even an estimate of the amount or value of the work to be done. The contractor agrees in view of the national emergency requiring immediate performance of the work to put up the required buildings "in the shortest possible time" (Article I, near foot p. 5).

As compensation he is to be reimbursed for the actual net expenses incurred in the performance of the work as may be approved or ratified by the contracting officer. For his own services "including profit and all general overhead expense" he is to receive a fee based upon a sliding scale with a maximum limit (Article III, p. 9).

Statutes as to Surety Bonds.

The act of February 14, 1905, Chapter 778 (33 Stat. 811; Compiled Statutes, Sec. 6923), provides for furnishing bonds for the performance of all work of construction or repair for the government:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payment to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract."

The contract (Article IX, p. 13), in language closely following that of the statute, also required the contractor to furnish a bond.

The statute with some supplemental provisions for its proper execution is embodied in the Army Regulations, 1913 edition, as Paragraphs 569 to 581. By Par. 569, "The amount of penalty in a contractor's bond will be fixed by the contracting officer," etc., followed by provisions of minimum and maximum limits.

The bond was therefore "required" by the contracting officer within the strictest sense of the term.

The act of August 13, 1894, Sec. 1, Chapter 282 (28 Stat. 279; Compiled Statutes, Sec. 3293), provides that all such bonds must be approved by the proper officer:

"Whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided*, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company."

The bond was "approved," as required by this act (Finding III, p. 18).

Interest of U. S. in Premium Recognized.

Prior to the dates of these contracts the surety companies had charged a premium of two per cent on the penalty of the bond as a premium (record, p. 18, Finding III, end of first paragraph).

Prior to making any construction contracts the officers of the War Department negotiated with the representatives of the surety companies and induced them to reduce this premium from two to one per cent, the Secretary of War having directed that such premiums should be treated as a part of the cost of the work (same paragraph). At the same time the penalty of the bond to secure the faithful performance of the contract for each of the sixteen great cantonments was fixed at $250,000 (2d paragraph, Finding III, p. 18). Thus the premium to be charged on such a bond was by the arrangement with the surety companies $2,500 each.

The officer in charge of cantonment construction directed the constructing quartermasters for all the cantonments to refuse to accept any bond that did not conform to the above arrangement as to premium (3d paragraph, Finding III, p. 18). Thus the interest of the government in the amount of the premium was recognized from the start.

Pursuant to the requirements of law and of the contract, the claimant company furnished a bond for $250,000, with the Fidelity & Deposit Co. of Maryland as surety (same paragraph). That company charged a premium of $2,500 on the bond, which was duly paid by the claimant company. It was included in a voucher as one of the actual expenditures in the performance of the work and as such was paid by the government in August, 1917, as a part of the costs of the work (same paragraph).

The payment remained undisputed for two years and a half.

More than five hundred construction contracts were similarly made throughout the country and premiums paid by the contractors to secure their bonds for faithful performance of the work. These premiums were reimbursed to the contractors as a part of the cost of the work (end 3d paragraph, Finding III, p. 18).

In January, 1920, after the petition in this case had actually been filed claiming reimbursement for the premiums on the various policies of insurance, it was deducted from another amount accruing in favor of the claimant company in accordance with a decision of the Comptroller of the Treasury adverse to the allowance of such premiums (Finding III, foot p. 18). The petition in this case was thereupon amended to claim the amount of such premium (amended petition, Rec. pp. 2–4, Pars. VII to XI; see Rec. near top p. 18).

Terms of the Contract.

The premium here claimed is precisely and literally within the terms of the contract as a part of the cost of the work to be paid by the United States. One of those costs which the United States agreed to pay is (Rec. top p. 8, Article II):

"(*h*) Such bonds, fire, liability and other insurance as the contracting officer may approve or require."

Article IX, p. 13, specifically requires the contractor to furnish a bond prior to commencing the work.

The act of 1905, *ante*, p. 5, required that a bond be given. That of 1894, *ante*, p. 6, required that it be approved by the contracting officer. This bond "was required and approved by the contracting officer" (Finding III, two-thirds down p. 18). The fact that it was also re-

quired by statute is no objection to its inclusion as a part of the cost of the work. On the contrary, the right is even more clearly apparent when it was not a mere requirement of the contracting officer but was also required by law.

Object of the Contract.

The object to be attained by the contract clearly concurs with the plain construction of the language in requiring the expense of this bond to be borne by the government. The object of the cost plus contract was to secure the speediest possible performance of the work. In the fluctuating conditions of war times contractors were unable to name fixed prices. The cost of labor and materials varied from day to day. Prudent contractors were unwilling to assume obligations to do work of this character for a fixed sum. The government therefore agreed to pay the entire cost of the work and in addition thereto a profit for the use of the contractor's experience, skill, acquaintance with the labor market and facility in handling it, etc. To make a contractor whole for his expense it was just as necessary to reimburse him for the cost of his bond as it was for the cost of the wood and iron which was to enter into the construction. A different interpretation of the contract would compel the contractor to bear a very necessary element of the cost himself and would deprive him to that extent of the stipulated profit.

To be Interpreted as a Whole.

By Article XIV, p. 14, of the contract, it is provided:

"This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern."

The contract read in the light of this provision is in-

tended to reimburse the contractor for "such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer" (Article II, Rec. p. 6).

True, a specification of items follows, but this is intended to carry out the general intent to reimburse the contractor. The profit or fee, as it is termed, is given by Article III, p. 9, and is there defined "as full compensation for the services of the contractor, including profit and all general overhead expense."

Not "Overhead Expense" or "Profit."

A definite item of premium for a surety bond required by law and by the contract and which was by law required to be and in fact was approved by the contracting officer is in no sense a "general overhead expense," much less a "profit." It is a direct cost of this contract. To compel the contractor to pay it out of his fee or profit is clearly inconsistent with the general purpose of the contract.

Decision and Payment.

The contract provides, Article IV, pp. 9, 10, for periodical statements and payments. That article provides (Rec. middle p. 10):

"The statement so made and all payments made thereon shall be final and binding upon both parties hereto except as provided in Article XIV hereof."

Article XIV (pp. 14, 15) provides for settlement of doubts and disputes.

It is hard to see how the contract could more positively or more broadly have vested finality of decision in all matters of payment in the contracting officer.

This is but a more positive statement of the same idea already embodied in Article II saying that the contractor is to be reimbursed for such of its expenditures "as may be approved or ratified by the contracting officer."

A decision so rendered is conclusive according to many decisions of this court. *Kihlberg* v. *United States*, 97 U. S. 398, 401; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *United States* v. *Gleason*, 175 U. S. 588; *Ripley* v. *United States*, 223 U. S. 425.

A settlement thus made in accordance with a provision of the contract would not be allowed to be disturbed as between private parties or by a private party against the United States. *C. M. & St. P. Railway* v. *Clark*, 178 U. S. 353. No more should the United States be allowed to question the validity of a payment once made under such abundant sanction.

In compliance with the provisions of Articles IV (Record, pp. 9, 10) and XIV (pp. 14, 15), the item claimed was included in a voucher and paid. This action was under the contract conclusive. Where the parties were at the time of settlement and payment agreed upon their respective rights and liabilities a party would not be heard to say, were the case one between individuals, that the approval of the contracting officer was to go for nothing, and that a payment might later be deducted in the course of settling an entirely different account. "The voucher covering both of these deductions, the plaintiff receipted for under protest" (last sentence Finding IV, top p. 19). Such a protest was amply justified.

Contemporaneous Construction.

The premium on the surety bond, as we have seen, was not only ordered to be paid, but was actually paid to the claimant company. Not only was it paid, but it remained in the possession of the contractor for about

two years and a half until it was taken back again. Not only was it paid to this contractor but to about five hundred others. (Finding III, near foot p. 18.)

The minds of the parties met at the time of entering into the contract. And what they meant by the original contract was demonstrated by their subsequent action in carrying it out.

In *Chicago* v. *Sheldon*, 9 Wall. 50, 54, the court said:

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

In *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done."

According to this rule the practical construction placed by both parties to the contract upon it when it was in process of execution would be conclusive were it otherwise doubtful.

Bonds as Court Costs.

In *The South Portland*, 95 Fed. 295, the claimant, the owner of a libeled vessel, gave a bond for her release. Ultimately a decree was rendered in his favor dismiss-

ing the libel with costs. It was held that as the bond was obtained from a surety company which in the regular course of business charged a premium for it, the expense was a legitimate item in the taxable costs. After referring to the change of practice in modern times whereby such bonds instead of being obtained from wealthy friends of the litigant as a matter of accommodation, are furnished by surety companies as a business for such premiums, the court said (p. 296):

"In communities where business methods conform to modern customs, such expenditures as are the subject of dispute on this hearing, are in fact necessary, and every reason for allowing the prevailing party to recover other necessary expenditures in maintaining his rights in a litigated case applies with equal force in favor of exercising the discretion vested in courts of admiralty by awarding to the prevailing party, as part of his taxable costs, the amounts actually paid to surety companies for giving bonds and stipulations exacted by the defeated party."

This was reaffirmed in the case of *The John D. Shelby*, 158 Fed. 662, where the court said (p. 663):

"The entire proceeding, therefore, seems to be justifiable and legal, and the premium paid for the bond should be taxed, if reasonable in amount. Discretion is vested in the court to prevent the payment of unwise and extravagant premiums, assented to upon the theory that they were taxable in any event. The burden rests upon the losing party to object, if an unreasonable agreement has been made for the payment of a premium and the amount to be taxed should be only such an amount as is customary or reasonable under the circumstances of the case."

History of Contingents.

It is stated in the brief for the United States, p. 10, that the cost-plus system of contracts was "in every

cases enormously and unconscionably profitable to the contractors." This, so far as it is a statement of fact, is not only not supported by any evidence but is directly refuted by an official publication, "America's Munitions, 1917–1918, Government Printing Office, 1919, Book VI, Construction Division, p. 533, Chapter I, Cantonments and Camps, pp. 533–547.

It is there said among many other statements of interest:

"Efficiency in war is a matter of teamwork. Every vital branch of the military organization must do its part well if the whole effort is not to fail. The weak link in the chain might well have been the construction organization of the Army, for here was an emergency job on a scale beyond anything in the experience of our greatest builders. America in her first 18 months of war was able to send to France across 3,000 miles of dangerous water more men than the United Kingdom in a similar period could send to the front over the netted and laned 40 miles of English Channel. No slight share of the credit for this achievement must go to the cantonment builders, who despite great difficulties had the housing ready for the new armies when they were called forth for training" (p. 537).

"There had been, however, a measure of pioneering in several of these directions. The Council of National Defense had an organization of civilian experts in many lines gathered together in Washington to give advice to the military authorities. Through its committees the council prepared a form of contract upon what came to be known as the 'cost-plus with sliding scale and fixed maximum fee' plan, which limited the cantonment contractor in each case to a maximum fee of not more than $250,000, the Army itself retaining control of the cost of materials and the wages paid to labor.

Since the cantonments cost anywhere from $8,000,000 to more than $12,000,000 each, the average fee to the contractor was slightly less than 2½ per cent, out of which the contractor had to pay overhead expenses, such as his main office expenses and the like; so it will

be seen that the United States drove a close bargain with its cantonment builders in spite of the breathless haste to get the work done" (p. 539).

"Only a builder of secure financial standing could handle such a construction contract. Frequently his pay-roll and current bills for supplies amounted to half a million dollars in a week. Let the government delay a few days in its payments to him and he might find himself obliged to raise a million dollars in cash on the instant to meet his immediate obligations."

"The race was a close one, being won by Camp Taylor, at Louisville, which was 79.4 per cent complete on the day the contest ended, lacking only six-tenths of 1 per cent of coming up to the maximum 80 per cent of completion regarded as possible in the time available" (p. 542).

The last paragraph above quoted shows that the work on this particular cantonment stood at the head of all in promptness and efficiency of construction.

CONCLUSION.

The judgment should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES, APPELLANT,
v.
MASON & HANGER COMPANY, APPELLEE. } No. 410.

PETITION FOR A WRIT OF CERTIORARI ON SUGGESTION OF DIMINUTION OF THE RECORD.

Comes now the Solicitor General on behalf of the appellant in the above-entitled case and suggesting to the court a diminution of the record on appeal by the omission therefrom of the matter hereto attached marked "Exhibit A," and which constituted a part of the record in the court below, moves the court that a writ of certiorari issue to bring such omitted matter before this court.

In its request for findings of fact the appellant, the defendant below, on April 2, 1921, requested, among other things, that the Court of Claims make the following finding of fact, to wit:

IX.

On June 28, 1917, instructions were sent to the plaintiff as follows (p. 38, middle):

"You will at once obtain insurance protecting material against fire during time between delivery by carrier and acceptance by Govern-

ment, also such workmen's compensation insurance as required by statutes. Other insurance risks assumed by Government. Your attention directed to clause H, article 2, whereby Government does not assume responsibility for losses and expenses resulting from fault or neglect. Detailed instructions mailed."

Subsequently, on July 17, 1917, Maj. W. A. Dempsey, in a communication to the constructing quartermaster, Louisville, Ky., returned the policies of insurance transmitted on July 14, 1917, which constitute the basis of this claim (Report, War Department, pp. 99, 100), unapproved, stating the fact that no such policies had been authorized in any previous instructions.

Said policies were procured without the approval or requirement of the contracting officer at the time they were taken out and said contracting officer formally disapproved same.

In its findings of fact and the conclusion of law announced on April 18, 1921, in the above-entitled case, the Court of Claims omitted to make the aforesaid requested findings.

On June 11, 1921, the appellant moved said court to correct its finding of fact V and its conclusion of law in pursuance with Exhibit A, hereto attached.

On June 13, 1921, the aforesaid motion was argued and overruled.

On June 28, 1921, the appellant filed with the aforesaid court an application for an appeal from its judgment to this honorable court.

On June 30, 1921, the aforesaid application for an appeal was allowed.

On July 6, 1921, the appellant received from the clerk of the aforesaid court the transcript of record, which, upon examination, disclosed that the appellant's motion to amend the court's finding of fact V and the conclusion of law (Appellant's Exhibit A) had been omitted therefrom.

On July 7, 1921, the appellant filed with the aforesaid court a motion praying for leave to have the aforesaid motion to amend incorporated in the transcript of record.

On July 9, 1921, the aforesaid court overruled the appellant's motion to incorporate the aforesaid Exhibit A in the transcript of record.

Wherefore, the appellant herein now prays the issuance of the writ hereinbefore requested.

JAMES M. BECK,
Solicitor General.

EXHIBIT A.

DEFENDANT'S MOTION TO AMEND FINDINGS OF FACT.

Now comes the defendant, by the Attorney General, and moves the court to amend the findings of fact filed herein on the 18th day of April, 1921, as follows:

V.

Amend the fifth finding, on page 2 of the findings of fact, by striking from the first sentence in the finding the phrase, "Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer."

Amend the balance of the sentence to read:

> Before work was actually started under the contract the plaintiff company took out policies of insurance of the following character (p. 25, qq. 15, 16, 20, line 8): Public liability insurance, automobile liability insurance, and burglary and holdup insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52.

After the words "to the sum of $9,114.52" insert the following amendment:

> Article II, subdivision (h) of the contract of June 20, 1917 (p. 9), provides that "fire, liability, and other insurance" shall be taken out by the plaintiff company "as the contracting officer may approve or require."

On June 28, 1917 (plaintiff's Exhibit No. 7, p. 38, middle), the contracting officer sent out instructions to the plaintiff company as follows: "You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensations insurance as required by statutes. *Other insurance risks assumed by Government.* Your attention directed to clause H, article two, whereby Government does not assume responsibility for losses and expenses resulting from your fault or neglect. Detailed instructions mailed." [Italics ours.]

CONCLUSION OF LAW.

Amend the "Conclusion of law" (p. 3) by striking out the words "and the sum of $9,114.52 as found in Finding V" (*line* 4).

Whether the court amends the conclusion of law or not, counsel for the defendant request that the additional facts and the proposed amendment requested be inserted in Finding V.

ROBERT H. LOVETT,
Assistant Attorney General.

JOHN E. HOOVER,
FRANK E. SCOTT,
WILLIAM F. NORRIS,
Attorneys.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES, APPELLANT,
v.
MASON & HANGER COMPANY,
appellee.
} No. 410.

APPEAL FROM THE COURT OF CLAIMS.

DEFENDANT'S MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY A SPECIFIC FINDING OF FACT, AND BRIEF.

Comes now the Solicitor General on behalf of the appellant in the above-entitled cause and moves this honorable court to remand the record in this cause to the Court of Claims with instructions to find and certify to this court, as a matter of fact, in addition to the facts found and certified in said record—

Whether or not the contracting officer named in the contract of June 20, 1917, between the United States and the appellee, issued the following instructions to said appellee on June 28, 1917:

> You will at once obtain insurance protecting material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensation insurance as required by statutes. Other insurance risks assumed by Government.

> Your attention directed to clause H, article 2, whereby Government does not assume responsibility for losses and expenses resulting from fault or neglect. Detailed instructions mailed.

In its request for findings of fact the appellant, the defendant below, on April 2, 1921, requested, among other things, that the Court of Claims make the following finding of fact, to wit:

IX.

> On June 28, 1917, instructions were sent to the plaintiff as follows (p. 38, middle):
>
> "You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensation insurance as required by statutes. Other insurance risks assumed by Government. Your attention directed to clause H, article two, whereby Government does not assume responsibility for losses and expenses resulting from fault or neglect. Detailed instructions mailed."
>
> Subsequently, on July 17, 1917, Maj. W. A. Dempsey, in a communication to the constructing quartermaster, Louisville, Ky., returned the policies of insurance transmitted on July 14, 1917, which constitute the basis of this claim (Report, War Department, pp. 99, 100), unapproved, stating the fact that no such policies had been authorized in any previous instructions.
>
> Said policies were procured without the approval or requirement of the contracting

officer at the time they were taken out and said contracting officer formally disapproved same.

In its findings of fact and the conclusion of law announced on April 18, 1921, in the above-entitled cause, the aforesaid Court of Claims, among other findings of fact, made the following finding and conclusion of law:

V.

Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer, the plaintiff took out policies of insurance of the following character: Public liability insurance, automobile liability insurance, and burglary and hold-up insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52. Maj. Dempsey, who on July 16, 1917, had ceased to be the contracting officer, on July 17, 1917, refused to approve the payment of premiums on these policies; but upon full payment of these premiums a voucher for the same was submitted by the plaintiff to the constructing quartermaster at the place of construction and by him transmitted to the War Department. On December 22, 1917, Col. I. W. Littell, the contracting officer, approved the action of the plaintiff in taking out the policies of insurance above referred to and authorized and directed the constructing quartermaster to pay to the plaintiff the sum of $9,114.52, the amount of the premiums paid by it on said policies. The said quartermaster submitted the question of payment of the afore-

said amount to the Comptroller of the Treasury, who decided that the said amount should not be paid to the plaintiff, and said amount has not been paid by the United States to the plaintiff.

CONCLUSION OF LAW.

The court, upon the foregoing findings of fact, decides as a conclusion of law that the plaintiff is entitled to recover the sum of $2,500 as found in finding III, the sum of $450 as found in finding IV, and the sum of $9,114.52 as found in finding V. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twelve thousand and sixty-four dollars and fifty-two cents ($12,064.52).

On June 11, 1921, the appellant moved said court to correct its finding of fact V and its conclusion of law, as follows:

DEFENDANT'S MOTION TO AMEND FINDINGS OF FACT.

Now comes the defendant, by the Attorney General, and moves the court to amend the findings of fact filed herein on the 18th day of April, 1921, as follows:

V.

Amend the fifth finding, on page 2 of the findings of fact, by striking from the first sentence in the finding the phrase, "Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer."

Amend the balance of the sentence to read:

"Before work was actually started under the contract the plaintiff company took out policies of insurance of the following character (p. 25, qq. 15, 16, 20, *line 8*): Public liability insurance, automobile liability insurance, and burglary and holdup insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52."

After the words "to the sum of $9,114.52," insert the following amendment:

Article II, subdivision (h), of the contract of June 20, 1917 (p. 9), provides that "fire, liability, and other insurance" shall be taken out by the plaintiff company "as the contracting officer may approve or require."

On June 28, 1917 (Plaintiff's Exhibit No. 7, p. 38, *middle*, the contracting officer sent out instructions to the plaintiff company as follows: "You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensation insurance as required by statutes. *Other insurance risks assumed by Government.* Your attention directed to clause H, article two, whereby Government does not assume responsibility for losses and expenses resulting from your fault or neglect. Detailed instructions mailed." [*Italics ours.*]

CONCLUSION OF LAW.

Amend the "Conclusion of law" (p. 3) by striking out the words, "and the sum of $9,114.52 as found in finding V" (*line 4*).

Whether the court amends the conclusion of law or not, counsel for the defendant request that the additional facts and the proposed amendment requested be inserted in Finding V.

ROBERT H. LOVETT,
Assistant Attorney General.

JOHN E. HOOVER,
FRANK E. SCOTT,
WILLIAM F. NORRIS,
Attorneys.

On June 13, 1921, the aforesaid motion was argued and overruled.

On June 28, 1921, the appellant filed with the aforesaid court an application for an appeal from its judgment to this honorable court.

On June 30, 1921, the aforesaid application for an appeal was allowed.

On July 6, 1921, the appellant received from the clerk of the aforesaid court the transcript of record which, upon examination, disclosed that the appellant's motion to amend the court's finding of fact V and the conclusion of law, set out in full above, had been omitted therefrom.

On July 7, 1921, the appellant filed with the aforesaid court, in the words and figures following, a motion for leave to have the aforesaid motion to amend incorporated in the transcript of record:

MOTION TO AMEND THE TRANSCRIPT OF RECORD.

Now comes the defendant, by the Attorney General, and moves the court to amend the transcript of record on appeal to the Supreme

Court of the United States by incorporating therein the defendant's motion to amend the court's findings of fact and conclusion of law filed June 11, 1921, in the following words and figures:

Amend the fifth finding, on page 2 of the findings of fact, by striking from the first sentence in the finding the phrase, "Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer."

Amend the balance of the sentence to read:

"Before work was actually started under the contract the plaintiff company took out policies of insurance of the following character (p. 25, qq. 15, 16, 20, *line 8*): Public liability insurance, automobile liability insurance, and burglary and holdup insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52."

After the words "to the sum of $9,114.52," insert the following amendment:

"Article II, subdivision (h), of the contract of June 20, 1917 (p. 9), provides that 'fire, liability, and other insurance' shall be taken out by the plaintiff company 'as the contracting officer may approve or require.'

"On June 28, 1917 (plaintiff's Exhibit No. 7, p. 38, *middle*), the contracting officer sent out instructions to the plaintiff company as follows: 'You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government, also such workmen's compensation insurance as required by statutes.

Other insurance risks assumed by Government. Your attention directed to clause H, article two, whereby Government does not assume responsibility for losses and expenses resulting from your fault or neglect. Detailed instructions mailed.'" [*Italics ours.*]

CONCLUSION OF LAW.

Amend the "Conclusion of law" (p. 3) by striking out the words, "and the sum of $9,114.52 as found in Finding V" (*line 4*).

Whether the court amends the conclusion of law or not, counsel for the defendant request that the additional facts and the proposed amendment requested be inserted in Finding V.

ROBERT H. LOVETT,
Assistant Attorney General.

On July 9, 1921, the aforesaid court overruled the appellant's motion to amend the transcript of record by incorporating therein the prior motion to amend the findings of fact and the conclusion of law.

ARGUMENT.

When it is seen that the appellant is without any valid grounds of defense with this fact omitted from the court's finding of fact No. V (Rec. p. 19), its materiality is at once apparent.

The findings of fact of the Court of Claims are treated as a special verdict.

Under Rule 1 of this court relating to appeals from the Court of Claims it is required that the record shall consist of a transcript of the pleadings in the case, of the final judgment or decree of the court,

and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case. It irresistibly follows, therefore, that the record here on appeal is lacking in the elements "necessary to a proper review of the case" because it omits to include, along with the ruling itself, the motion to amend the findings upon which the ruling is predicated. Without the inclusion of the motion in the record this court is precluded from examining into and determining as to the soundness of the ruling which was objected to with respect to the materiality of a fact requested to be found and upon which the appellant relies for the purpose of making a proper defense.

United States v. *Adams*, 6 Wall. 101;
United States v. *Adams*, 9 Wall. 661;
Mahan v. *United States*, 14 Wall. 109.

The constructing quartermaster referred to in finding V (Rec. p. 19) had no power under the contract, nor was he ever authorized by Maj. W. A. Dempsey, the contracting officer, to instruct the appellee to take out any one of the four different types of insurance sued for and allowed in finding V (Rec. p. 19); contract, Art. II, subparagraph (h) (Rec. p. 8).

While it is true that a memorandum was approved by the Secretary of War on July 16, 1917, whereby Col. I. W. Littell was substituted for Maj. W. A. Dempsey as contracting officer, and while the latter, despite the issuance of said memorandum, continued to serve in the capacity of contracting officer until

December, 1917, yet Maj. Dempsey was never notified, either verbally or in writing, of the substitution of Col. Littell for himself as contracting officer. The fact that Col. Littell had been substituted as the successor of Maj. Dempsey as contracting officer was only accidentally discovered by the latter on July 27, 1917, when he saw the aforesaid memorandum designating Col. Littell as his successor on the desk of the chief clerk.

There was no privity between Dempsey, the original contracting officer, and Littell, his successor. Each of these officers was clothed with similar power to be exercised by them in their independent capacity as contracting officer without limitation or restriction. It necessarily follows, therefore, that any action taken while Dempsey was in the full discharge of the power vested in him as contracting officer was complete, final, and irrevocable, unless, on appeal to the officer in charge of the construction division of the Army or to the Secretary of War (contract, Art. XIV, Rec. pp. 14, 15), his decision should be reversed. No such appeal was taken by the appellee to either of the two officers named. The fact that Dempsey on June 28, 1917 (17 days prior to the substitution of his successor on July 16 and while he was then in full authority as contracting officer), issued instructions forbidding the appellee from taking out the insurance here involved relieved the appellant from the assumption of such a liability and cast the burden for the unwarranted and unauthorized act upon the appellee. In other words, while Littell,

Dempsey's successor, could authorize insurance to begin from the date that he assumed control as contracting officer, yet he could not authorize payment for an act on the part of the appellee which had been expressly prohibited by his predecessor as contracting officer.

Boutwell v. *United States*, 17 Wall. 604, 606–608;
Pullman Co. v. *Croom*, 231 U. S. 571, 575;
Pullman Co. v. *Knott*, 243 U. S. 447, 449;
Shaffer v. *Howard*, 249 U. S. 200, 201.

The appellant by this motion seeks to insure its right to have this court pass on the question of the scope of authority of Maj. W. A. Dempsey, the contracting officer designated in the contract of June 20, 1917, who was on July 16, 1917, succeeded by Col. I. W. Littell as contracting officer.

CONCLUSION.

It is respectfully submitted that the order herein prayed for should be granted.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.
JOHN E. HOOVER,
Attorney.

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IN THE

Supreme Court of the United States.

October Term, 1921.

THE UNITED STATES, Appellant,
v.
MASON & HANGER COMPANY. } No. 410.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE IN OPPOSITION TO APPELANT'S MOTION TO REQUIRE ADDITIONAL FINDINGS OF FACT

AND

APPELLANT'S MOTION FOR A WRIT OF *CERTIORARI*.

STATEMENT OF THE CASE.

The judgment by the Court of Claims in favor of claimant from which this appeal is taken arises (rec. pp. 1, 5) from a suit upon a cost plus contract for cantonment construction during the war. Claimant was allowed the cost of certain policies of liability, accident and burglary insurance (petition, p. 1; Finding V, p. 19; opinion, p. 20; judgment, p. 21).

The contract provides, so far as material here, for payment of costs as follows (Article II):

"(*h*) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require."

The term "contracting officer" is defined as follows:

"It is understood and agreed that wherever the words 'contracting officer' are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War and any duly appointed representative of the contracting officer."

The court has found the following facts material to the present motion:

(*a*) Major W. A. Dempsey was contracting officer named in the contract at the time of its execution, June 20, 1917 (Finding II, p. 18).

(*b*) On July 16, 1917, Colonel I. W. Littell, the officer in charge of cantonment construction in the War Department (middle p. 18, in Finding III) was substituted by the Secretary of War as contracting officer (Finding II, p. 18).

(*c*) Claimant, acting under instructions of the constructing quartermaster, the representative on the work of the contracting officer, took out the liability insurance in question and paid the premiums (Finding V, p. 19).

(*d*) Major Dempsey, on July 17, 1917, the day after he had ceased to be contracting officer, refused to approve the payment of these premiums (Finding V, p. 19).

(*e*) On December 22, 1917, Colonel Littell, then contracting officer, approved the taking out of these policies and directed payment of the premiums by the United States to claimant (Finding V, p. 19).

The court rendered judgment for the amount of the premiums for the following reason (opinion, rec. p. 20):

"These premiums were paid by the plaintiff, and such payment was approved by the contracting officer, and having been so approved under Article II of the contract the payment must be allowed."

The present motion seeks to require the Court of Claims to find whether on June 28, 1917, the contracting officer issued instructions to the contractor that it was to obtain fire insurance and workmen's compensation insurance and that other insurance risks would be assumed by the government. The petition for writ of *certiorari* asks to have added to the record the defendant's motion filed June 11, 1921, in the court below, for such a finding.

The theory apparently is that the notice on June 28, 1917, that risks other than of fire and accidents to workmen would be assumed by the United States was a final disapproval of all liability or burglary policies and rendered void the approval by the contracting officer on December 22, 1917.

The court below made no such finding as is now requested on behalf of the United States. This may have been (*a*) because the court did not consider that the facts asserted were true; or (*b*) because the court did not consider them to be established by competent evidence; or (*c*) because the court considered them so clearly immaterial as not proper to be included in the findings.

Objections to the Motion.

The following objections are made to this motion:

1. The finding asked is obviously immaterial. The court has found (Finding V, p. 19) that the expenditures were approved by the contracting officer. The contractor had in any case the right to take out the insur-

ance. The only question was whether the contracting officer would approve it as a liability of the United States under the contract. The instructions in question were not a disapproval. They were a declaration of policy. Upon further experience and the full presentation of a concrete case, the contracting officer or his successor at the proper time might see the error of the policy and approve the expenditure. This actually happened. It is very analogous to *United States* v. *Barlow*, 184 U. S. 123, 133, where the court said that the power of appointment of an engineer in charge "would be a useless right if, when appointed, he could anticipate and control the judgment of his successor."

2. By Article XIV, p. 14, it is provided:

"If the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provision of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination."

It appears by Finding III, p. 18, that Colonel Littell, who was on July 16 designated as contracting officer, was also "in charge of cantonment construction." Even if Major Dempsey had previously given his final disapproval to this expenditure, it was within Colonel Littell's authority to reverse Major Dempsey's decision as the officer in charge of cantonment construction, even if he could not do so as contracting officer.

3. The whole subject is already covered by Finding V, p. 19. It there appears (*a*) that "acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer, the plaintiff took out" the insurance policies here in question and paid premiums thereon; (*b*) that

Major Dempsey the day after he ceased to be contracting officer refused to approve payment of premiums on these policies; (*c*) that some months later Colonel Littell, contracting officer as well as the officer in charge of cantonment construction, approved them. It is now sought to show that Major Dempsey directed insurance to be obtained against certain risks, adding "Other insurance risks assumed by Government." The finding already covers the entire ground.

4. In one of the cases cited in the motion, *United States* v. *Adams*, 6 Wall. 101, 111, this court condemned a finding of letters and affidavits "because it was the object of the rule to impose upon the Court of Claims the duty of drawing the inferences and conclusions which such documents are supposed to establish, or to decide that they do not establish them."

5. It does not appear here that competent evidence proving that the contracting officer gave such instructions on June 28, 1917, was before the Court of Claims. Perusal of that record at the place referred to (p. 2 of motion) shows that the Comptroller of the Treasury in his adverse decision on the claim quoted the words appearing on p. 2 of the motion, preceded by the words, "Instructions were sent to the contractor on June 28, 1917, as follows:" The source of the instructions does not appear. Defendants' original request for findings of fact (motion, p. 2) asked only a finding that "instructions were sent." It was not until after the judgment (motion, p. 5) that a finding was asked that the contracting officer sent out instructions. The paper itself is not produced. Only an extract is quoted. The Court of Claims was justified on this state of the record alone, if for no other reason, in refusing to find that the contracting officer issued such instructions.

5. The present rule of this court prescribing findings

of the Court of Claims, promulgated January 29, 1879, 97 U. S. p. viii, is as follows:

"*Rule V.* In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact."

It took the place of an earlier rule, printed in *Mahan* v. *United States*, 14 Wall. 110, as follows:

"In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal, to this court."

It thus appears that prior to 1879 the Court of Claims was required in every case to do what appellant claims should be done here, but that the practice was found inexpedient and was therefore abandoned. What was a matter of right under the old rule is a matter of discretion now. We submit that we have shown reasons why the discretion should not be exercised.

Cases illustrating the more recent practice of the court are *United States* v. *New York Indians*, 173 U. S. 464, 470; *United States* v. *Anciens Etablissements*, 224 U. S. 309, 329; *United States* v. *Purcell Envelope Co.* 249 U. S. 313, 323. In the last case, the government's motion for additional findings was denied, but the right reserved to make an order for additional findings, if deemed necessary. It was found unnecessary when the case was argued on its merits.

The foregoing discussion sufficiently answers the petition for *certiorari*, with the exception of a single suggestion. It is not disputed that defendants' motion to amend findings was filed on June 11, 1921, as alleged. It will not assist this court to a settlement of the questions of law arising on the appeal to have that motion certified as a part of the record.

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Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES, APPELLANT,
v.
MASON & HANGER CO. } No. 121.

THE UNITED STATES, APPELLANT,
v.
NORTHEASTERN CONSTRUCTION CO. } No. 122.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES ON REHEARING.

The statement of these cases appears in the original brief of the Government and in its petition for rehearing, both of which are respectfully referred to.

On the original hearing in these cases in this court it was contended by the Government that the premium paid on the bond provided for in Article IX of the contract was not an expenditure in the performance of the work within the meaning of Article II of the contract obligating the Government to pay for the same. Appellees contended contrariwise. But this court in its opinion said:

> We are, however, not called upon to pass upon the conflicting contentions. The con-

tract contains other provisions that determine the liability of the Government.

The United States still contends as it did in its original brief and in its petition for a rehearing that within the meaning of Article II the premium paid on the said bond was not an expenditure in the performance of the work, and the Government does not waive that contention now, but insists upon it; nevertheless had the court determined that the premium was an expenditure within the meaning of Article II no petition for a rehearing would have been presented, when however, the court decided that Articles IV and XIV of the contract left the decision of the question as to whether the Government was liable for the premium so paid to the contracting officer to decide and that his decision so made and payment made thereon was final and binding upon both parties, the Government deemed it wise that the court's attention should be again called to this matter and that it further reflect thereon before definitely announcing that such were the legal effect of the provisions of the contract referred to.

The contract, therefore, becomes the important question for consideration.

It is an established principle of law on the subject of construction of contracts that a contract is to be interpreted as a whole and the true meaning of any provision in it arrived at from a consideration of all its provisions.

> The meaning of the parties must be ascertained by the tenor of the writing, and not by

looking at a part of it. *Boardman* v. *Reed*, 6 Peters, 327–344–345.

The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. *O'Brien* v. *Miller*, 168 U. S. 287–297.

In giving a proper construction the court is required to examine the entire contract, to consider the relation of the parties and the circumstances under which it was signed. *United States* v. *Stage Co.*, 199 U. S. 414–423.

The intention of the parties must be deduced from the entire agreement and from all its provisions considered together, because where a contract has many stipulations, it is plain that the parties understood and agreed that their intention was not expressed by any single part or provision of their agreement, but by every part and stipulation, so construed as to be consistent with every other part and with the entire contract. Judge Sandburn, in *Press Steel Co.* v. *Eastern Ry. Co.* (C. C. A.) 121 Fed. 609–611.

This general rule is made specifically applicable to this contract by its own provisions; Article XIV contains the following:

> This contract shall be interpreted as a whole and the intent of the whole instrument rather than the interpretation of any special clause, shall govern.

Having regard to this rule of construction it seems clear that this contract establishes a fiduciary relation between the Government and the contractor.

Article VI, paragraph (h) provides that the contractor shall

> At all times use its best efforts in all its acts hereunder to protect and subserve the interest of the Contracting Officer and the United States.

In the preliminary recitations of the contract there is this provision:

> Whereas, the Contractor has had experience in the execution of similar work, has an organization suitable for the performance of such work, and is ready to undertake the same upon the terms and conditions herein provided.

This was a representation by the contractor to the Government that the contractor was possessed of an organization which was suitable to the proper supervision of the construction work undertaken, and which would enable it to make effective its agreement "to protect and subserve the interest of the contracting officer and the United States."

The Government was undertaking to reimburse the contractor for the expenditure of millions of dollars of the public funds, and at a time when the Government had need in a special sense of every dollar of the public funds it could obtain. There was in that critical situation a special reason for requiring the contractor "to protect and subserve the interest of the contracting officer and the United States." And by the provisions above referred to, it is plain

the contractor undertook to perform this work while sustaining the fiduciary relation to the Government. It represented that it possessed an organization suitable for the proper supervision of the performance of the contract so that the Government should not be required to reimburse the contractor for any greater sum than under all the circumstances existing at the time was reasonably necessary.

The Government did not undertake in this contract to furnish an adequate personnel to supervise the construction work in its details. Indeed, the contract mentions only one Government representative, to wit, the contracting officer. Doubtless, there were other Government officials present during the construction work; but by the contract the Government did not undertake to supervise the details of the construction—that was entrusted by the contract to the suitable organization of the contractor; and in the performance of the work it is clear from all the provisions in this contract that the Government reposed in the contractor a special trust to so supervise the construction as to protect the Government's interests. That trust obligation the contractor could not avoid. It required of him the most careful supervision in the use of both materials and labor. The Government did not undertake to reimburse the contractor for all of his expenditures. The language of the contract in Article II is:

> The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures. * * *

It may be claimed, however, that by the terms of the contract the settlements made between the contracting officer and the contractor, monthly, were final and binding upon both parties and that the Government is bound and concluded thereby and can not go back of such settlements. Article VIII of the contract provides for the termination of the contract before completion, and provides for final settlement with the contractor in such event. This Article concludes with the following provision:

> * * * When the Contracting Officer shall have performed the duties incumbent upon him under the provisions of this Article, the Contracting Officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions or claims of any kind on the part of the Contractor hereunder or on account hereof.

This provision by its plain terms relates only to settlement with the contractor in case of termination before completion of the contract, which is not involved here. This settlement in case of termination before completion was a final settlement and each party released the other "from any and all demands, actions or claims of any kind." This is the only provision in the contract for release of actions and claims. There is no such provision which is to take effect upon termination of the contract by performance.

Article IV provides for a periodical settlement during the performance of the work. This Article contains this provision:

> * * * The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. * * *

Article XIV provides for settlement of disputes; this Article provides:

> * * * If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, of if the Contractor shall consider himself prejudiced by any decision of the Contracting Officer made under the provisions of Article IV hereof, the matter shall be referred to the Officer in charge of Cantonment Construction for determination. If, however, the Contractor shall feel aggrieved by the decision of the Officer in charge of Cantonment Construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

As to this provision of the contract in so far as it undertakes to bind the Government by a decision of an executive officer of the Government upon the proper construction of the provision of the contract, it is clearly void and not binding upon the Government. The courts can not thus be ousted of their jurisdiction and functions to construe contracts. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Guaranty Trust & Safe Deposit Co.* v. *Green Cove Springs & M. R. Co.*, 139 U. S. 137; and cases cited on pages 20, 21, 22, 23, 24, and 25 in the petition of the appellant for rehearing.

In interpreting this provision as to the finality of these monthly settlements and payments it is necessary in the law and under the express provisions of this contract to interpret all provisions of the contract which may relate in any way to or have any bearing upon its proper interpretation. Article I of the contract contains this provision:

> The title to all work completed or in course of construction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the Contracting Officer, all machinery, equipment, hand tools, supplies, and materials, for which the Contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. *These provisions as to title shall not operate to relieve the Contractor from any duties imposed hereby or by the Contracting Officer.* (The italics are ours.)

It is here provided as to title passing to the United States of all machinery, equipment, hand tools, supplies and materials for which the contractor shall be entitled to be reimbursed; that the title shall pass only after inspection and approval in writing by the contracting officer. This inspection and approval of the contracting officer and the passing of title to the United States is, however, not to operate to relieve the contractor from any of its contractual obligations. If the contracting officer should approve in writing machinery, equipment, hand tools, supplies and materials which were unnecessary for the

performance of the work because of his want of knowledge as to such necessity, or for any other reason, this would not be binding upon the Government. But, of course, such inspection and approval of these articles in the progress of the work would inevitably be followed by payment therefor at the monthly settlements, the contracting officer having inspected such articles and given his approval hereof in writing. If, therefore, these monthly settlements and payments are to be final and conclusively binding upon the Government, this reservation in Article I is nullified.

It is a well settled principle of construction of contracts that where separate provisions of the contract appear to conflict and one to nullify and render inoperative the other, that a construction will be sought which will not have this effect. Can the provisions as to the final effect of the settlement contained in Article IV be reasonably so construed as not to conflict with the provisions contained in Article I; if it can, it is the duty of the court in construing it to give it such construction as will give effect to the provision of Article I; thus giving effect to both provisions.

These monthly settlements and payments were to be made as the work progressed. The magnitude of the contracts was such that it was plainly necessary for the contractor in order to carry on the work to obtain these monthly payments from the Government. It would manifestly be impossible owing to the great

magnitude of the work and the multiplicity of operations being carried on for the contracting officer to be fully informed as to all the facts necessary to a final settlement. In order, however, that the work should not be stopped some one must be clothed with authority to tentatively determine what was due to the contractor at each of these monthly settlements and payments. Continual disputes must be avoided if the work was to be carried out and completed in the shortest possible time, but it was not the intention of the contracting parties that these monthly settlements should be final and binding before any and all tribunals if it should later be discovered that overpayments were made to the contractor by reason of his failure to comply with his contractual obligations. In the progress of the work, however, they were to be final and binding as to matter of accounting between the parties for such partial, tentative settlements, and in order that the work might proceed in the most expeditious manner.

It is also provided in Article V that:

> * * * the Contractor shall preserve for a period of two years after its completion or cessation of work under this contract, all the books, records and other papers just mentioned.

This was manifestly necessary so that the Government might have such books and accounts available in case it should become necessary to make an investigation of the matter of compliance with the terms of the contract by the contractor, and to make

effective the provision of the contract that notwithstanding the contracting officer may have inspected and approved the purchase by the contractor of machinery, equipment, hand tools, supplies, materials, etc., that this inspection and approval should not relieve the contractor from full compliance with the obligations imposed upon him by the contract.

The passing of title to the Government of the completed structures, including in their cost both materials and labor, also were not to relieve the contractor according to the provisions of Article I from any obligation imposed upon it by the contract.

It therefore appears that the question always remains open whether the contractor did or did not comply with all the duties and obligations imposed upon him by the contract,—ever keeping in mind that the contractor sustained a position of trust and confidence toward the Government.

Article II of the contract contains this provision:

> The Contractor shall be reimbursed in the mannner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and as are included in the following items.

That is, the approval of the contracting officer is not sufficient under the terms of the contract to bind the Government, but it is made equally essential to the reimbursement of the contractor for any expenditure that it shall fall under one of the several items specifically recited in the contract.

It is also to be noted that there is no provision for a release of actions and claims upon the termination of the contract by performance.

The only settlement provided between the parties is the monthly statement made by the contractor and the payment on presentation of vouchers and invoices, but there is no final settlement with mutual releases of any and all actions and claims.

There have been filed by the Government and are now pending in various jurisdictions actions growing out of contracts like the one in question. This is particularly true of the actions which are brought with reference to the building of cantonments for all of these cantonment contracts are practically the same as the contract in these cases. In these cantonment actions the Government is seeking to recover damages for waste and extravagance of a character that amounts to a fraud against the Government. Up to the present time actions have been filed and are now pending in the District of Massachusetts; the Eastern District of New York; the District of New Jersey; Eastern District of West Virginia; Eastern District of South Carolina; Southern District of Ohio; Eastern District of Michigan; Eastern District of Arkansas; Southern District of Iowa; District of Kansas; Western District of Texas. The amount of recovery sought in these several cases ranges from three million to seven million dollars each. The defendants are pleading and relying upon the *finality* of the settlements as interpreted by the opinion hereinbefore announced in these cases, and citing such

opinion as decisive authority for their contention. And so it becomes important and of vital interest to the Government that the court carefully consider the terms of this contract with respect to the court's reference to the finality of the settlement evidenced by the action of the contracting officer in making the monthly settlements provided for in Article IV of the contract.

There are many other actions instituted by the United States seeking to recover for overpayments made under these war contracts, and the provisions of these contracts for monthly payments are in their essential features similar to the provisions of Article IV of the contract here in question.

It does not seem reasonable in the circumstances under which these contracts were made that the provision stipulating for monthly payment should estop the Government from thereafter questioning their correctness. The Government's necessities and situation at the time these contracts were executed and during their performance were trans-normal because of the presence of actual war. The Government needed war necessities and instrumentalities, and it required them "in the shortest possible time." The contractor had to have early payments, and frequently advance payments were made that he could perform the service or produce the articles required. These circumstances should be taken into consideration in construing the terms of the contract. The monthly payments in the circumstances were not made as in the ordinary course of business in times of peace—this is obvious.

The question which the Government makes is: that the premium paid upon this bond is not a part of the actual net expenditures in the performance of the work for which the Government undertook to reimburse the contractor.

The court decided that it was not necessary to determine that question for the reason that the contract provided that the decision of the contracting officer should govern in case of a dispute, and that this decision was absolutely and finally binding upon both parties whenever the question should be brought under consideration in a court.

It is the Government's contention that it was beyond the power and authority of an executive officer of the Government to bind the Government by a misconstruction of the terms of the contract so that the question could not be raised and decided by the courts. If the court should reach the conclusion that the contention of the Government in this respect is correct, then, of course, the court will be under the necessity of interpreting the contract and determining whether this is an item of cost for which, having been incurred by the contractor, the Government is required to reimburse him.

Article II provides that "the contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the *performance of said work* as may be approved or ratified by the contracting officer and as are included in the following items;" (the italics are ours). Paragraph (h) is one of those items, and provides for reimbursement for:

> Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require;

This Article requires the Government to reimburse the contractor only for expenditures incurred in the *performance of the work*. The bond to obtain which this premium was paid was not a bond required by the contracting officer in the performance of the work, but was required by the statute, and this must be given preliminary to any performance of the work under the contract.

Article IX also provides:

> The Contractor shall prior to commencing the said work furnish a bond. * * *

It was, therefore, not an expenditure in the performance of the work as required by the contract, and it is our contention that if it was not an expenditure incurred in the performance of the work, it is immaterial to the court what construction may have been put upon this provision of the contract, the language being clear, by executive officers of the Government.

Article XIV provides:

> * * * If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, * * * the matter shall be referred to the Officer in charge of Cantonment Construction for determination. * * *

It is to be noted that the interpretation is to be an interpretation of "*anything in this contract.*"

The contracting officer or the officer in charge of cantonment construction, or the Secretary of War, are limited under the provisions of Article XIV to the interpretation of the meaning of the terms of the contract; they are not authorized to insert new terms. In authorizing the payment of any expense incurred by the contractor they must put their finger upon some section of the contract that in "meaning" permits it. If the payment of the premium is a liability of the United States it is only so because subdivision (h) of Article II when read in connection with the first paragraph that the expenditure must have been made in the performance of the work makes the Government liable therefor.

If any of these officers have put a wrongful interpretation upon that provision of the contract in holding that it renders the Government liable when such provision does not, the Government is not bound by any such interpretation because it is founded upon a misconstruction of law, to wit,—a wrong construction of the provisions of the contract.—*Wisconsin Central R. Co.* v. *United States*, 164 U. S. 190, 210; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 291.

It is respectfully submitted that the judgments of the Court of Claims, in so far as they relate to the premiums upon the bonds in question, should be reversed.

JAMES M. BECK,
Solicitor General.
RALPH E. MOODY,
Special Assistant to the Attorney General.

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Supreme Court of the United States.

October Term, 1922.

No. 121.

THE UNITED STATES, *Appellant*,

v.

MASON & HANGER COMPANY.

No. 122.

THE UNITED STATES, *Appellant*,

v.

NORTHEASTERN CONSTRUCTION COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES ON REHEARING.

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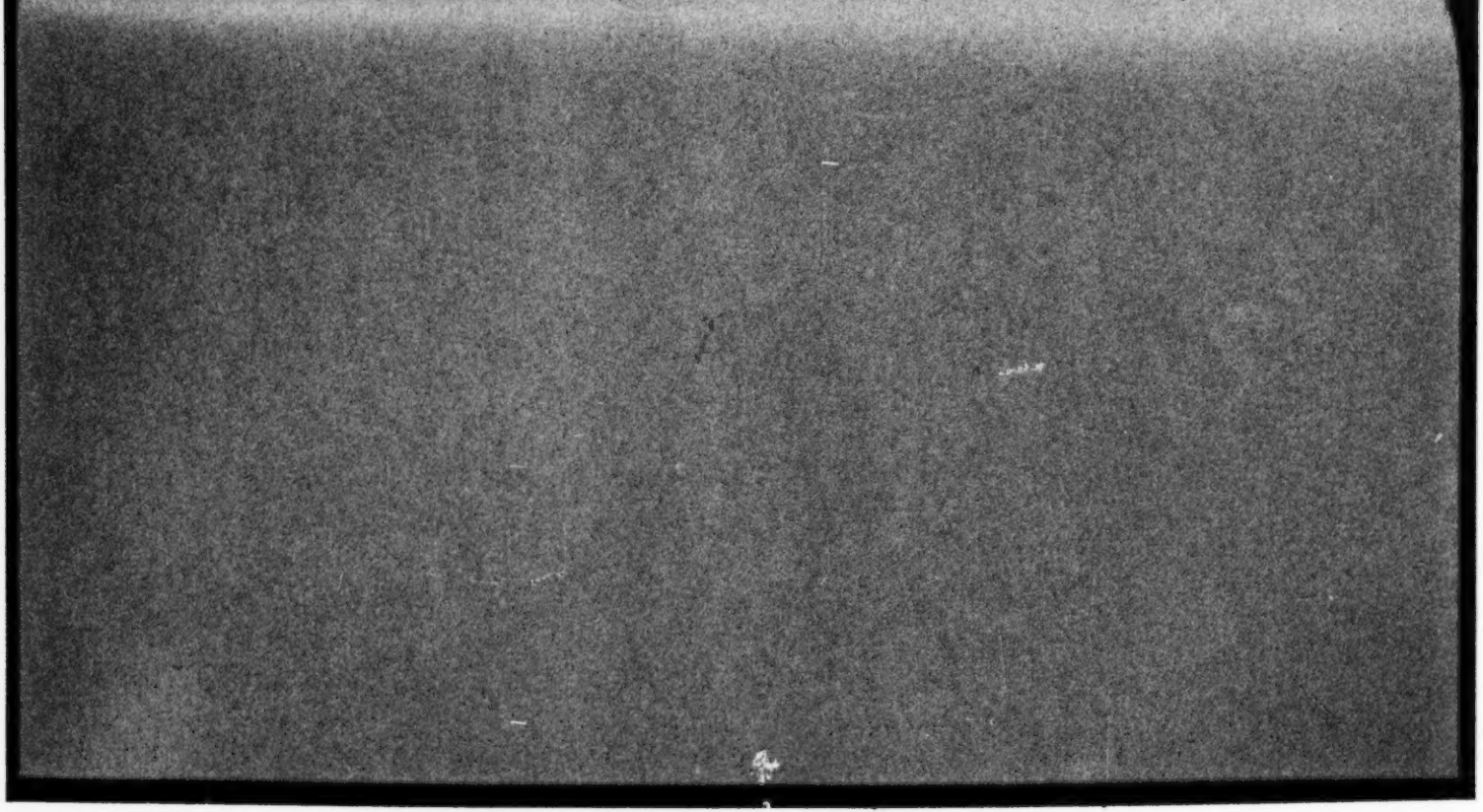

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Supreme Court of the United States

October Term, 1922.

THE UNITED STATES, *Appellant*, v. MASON & HANGER COMPANY. } No. 121.

THE UNITED STATES, *Appellant*, v. NORTHEASTERN CONSTRUCTION CO. } No. 122.

Appeals from the Court of Claims.

BRIEF FOR APPELLEES ON REHEARING.

I. STATEMENT OF THE CASES.

These are claims arising under contracts with the War Department for building construction during the war, the former at Camp Zachary Taylor, Louisville, Kentucky, the latter at Astoria, Long Island. The contractor was to be paid the cost of construction plus a fee for services. The claims involve items of reimbursable costs.

In the *Mason & Hanger* case, No. 121, they are as follows:

(1) Premium on bond of $250,000 given by the contractor to the United States for fulfillment of the contract (Finding III, rec. p. 18.)	$2,500
(2) Premium on bond given by the subcontractor to the principal contractor (claimant in this case) for fulfillment of the sub-contract (Finding IV, rec. top p. 19.)	450
(3) Premiums on policies of public liability insurance, automobile liability insurance, and burglary and holdup insurance (Finding V, rec. middle p. 19.)	9,114.52
	$12,064.52

The case of the *Northeastern Construction Company*, No. 122, involves only a premium on the surety bond given by the main contractor for the performance of the contract and is similar to item 1 of the *Mason & Hanger* case, and amounts to $150 (rec. p. 122, p. 14).

The Court of Claims rendered judgment for the full amount claimed in both cases.

The opinion, *Mason & Hanger*, Rec. p. 19; Northeastern rec. p. 15, is reported 56 C. Cls. 238.

The United States does not question the allowance of items 2 and 3 of the *Mason & Hanger* case. The only error alleged is as to the allowance of item 1 of the *Mason & Hanger* case and of the entire amount in that of the *Northeastern Construction Company*.

References throughout this brief are to the *Mason and Hanger* record, No. 121, unless otherwise stated.

The premium in question was paid to the contractor by the United States as a part of the costs of the contract, in the regular course of business, rec. p. 18. Under a ruling of the Comptroller of the Treasury, it was, over two years later, deducted from money due the contractor on another account. See also record in Northeastern Construction Company case, p. 4, Finding III.

Contract Provisions.

The portions of the contract material to this case are as follows:

Article II, rec. pp. 6, 8:

"Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

* * * * * * *

"(h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and

such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor."

Article IV, rec. p. 9:

"Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) The cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to three and one-half per cent (3½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate not exceeding three and one-half per cent (3½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof."

Article IX, rec. p. 13:

"Bond.—The contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the contracting officer, in the sum of two hundred fifty thousand ($250,000) dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor."

Article XIV, rec. p. 14:

"Settlement of disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination. If, however, the contractor shall feel aggrieved by the decision of the officer in charge of cantonment construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto."

Article XV, rec. p. 15:

* * * * * * *

"It is understood and agreed that wherever the words 'contracting officer' are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War and any duly appointed representative of the contracting officer."

Statutes.

Act of August 13, 1894, Sec. 1, Ch. 282, 28 Stat. 279:

'Whenever any recognizance, stipulation, bond or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing any-

thing in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided*, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company."

Act of February 14, 1905, Ch. 778, 33 Stat. 812:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract."

This statute with some supplemental provisions for its proper execution is embodied in the Army Regulations, 1913 edition, as Paragraphs 569 to 581. By Par. 569, "The amount of penalty in a contractor's bond will be fixed by the contracting officer," etc., followed by provisions of minimum and maximum limits.

II. BRIEF OF ARGUMENT.

Appellees maintain:

(1) The payment of the bond premium as one of the costs of the contract was only what a correct construction of the contract required.

(2) The contemporary recognition by the War Department that the contract required payment of this and other like bond premiums is the best proof that this was a correct construction.

(3) The payment of the bond premium in the manner provided by the contract is made by the contract conclusive upon both parties.

(1) *Payment was Correct.*

The payment of the premium here claimed was precisely within the terms of the contract. One of the costs which the United States agreed to pay is (Article II, quoted, *ante*, foot p. 2):

"(*h*) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require."

Article IX, quoted, *ante*, p. 4, specifically requires the contractor to furnish a bond prior to commencing the work.

The act of 1905, *ante*, p. 5, requires that a bond be given. That of 1894, *ante*, p. 4, requires that it be approved by the contracting officer.

This bond "was required and approved by the contracting officer" (Finding III, two-thirds down p. 18). The fact that it was also required by statute is no objection to its inclusion as a part of the cost of the work. On the contrary, the right is even more clearly apparent when it was required, not merely by the contracting officer, but also by law.

The bond premium is therefore a *reimbursable* cost.

It is objected that this cost was not an "*expenditure in the performance of said work*" and therefore not reimbursable under the language of Article II, Record, p. 6, *ante*, p. 2, providing reimbursement "*for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items.*" It is fallacious to treat these general introductory words as controlling the later particular words in the several clauses thereafter defined. Bonds, if approved as required, are expressly, par. (h), Record, top p. 8, *ante*, foot p. 2, recognized as costs under the contract. The general clause in the introduction must be read in the light of the later particular definitions.

But even if this general clause is the literal test of inclusion, one of the obligations of this contract is to give this particular bond. Its cost is therefore an expenditure in the performance of this work. It is one of a class of costs, neither for materials nor for labor, required by modern business methods, such as fire insurance, insurance against workingmen's casualties or against accidents to property or to other persons and rental of machinery. All these are no less actual costs of the contract than expenditures for materials and labor. The contract recognizes all of these as reimbursable costs and the War Department was right in including the cost of securing the guaranty bond as a part of the cost of the work.

A complete answer to such over-refinements is found in Article XIV, *quoted ante*, p. 4, providing that the contract shall be interpreted as a whole and that the intent of the whole is to govern. The intent of the contract is to *reimburse* the contractor's costs and to pay a fixed profit above the costs. The court will take

judicial notice that bonds are now purchased from surety companies. See *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 423, 424; *Hill* v. *American Surety Co.*, 200 U. S. 197, 202; *The South Portland*, 95 Fed. 295. The cost of the bond forms a part of the cost of the performance of any building contract equally with material and labor. Under a lump sum contract, the contractor must include the bond premium among his costs. Profit does not begin until after the bond, equally with other costs, is paid for. The general intent of the contract makes it as necessary to reimburse a contractor for the cost of his bond as for the cost of the wood and iron entering into the construction. The interpretation of the contract asserted by appellant would compel the contractor to bear a very necessary element of the cost and would deprive him to that extent of the stipulated profit. This was the view of the court below, saying, rec., p. 20:

"It is difficult to understand why the premium on such bond is not a part of the cost of the contract. It had to be given and approved before the contract could take effect; it was a cost which the contractor was called upon to incur; it was a cost moreover which the contract itself provided for; it can not be said that it is separate and distinct from the contract, and not a part of it."

Federal courts of high authority have referred to the difficulty of ascertaining the elements which should enter into any computation of cost. Thus, as far back as 1811, Mr. Justice Washington said:

"The whole cause turns upon the legislative meaning of the word cost. * * * The term is certainly of equivocal meaning, and is sometimes used to express the value of a thing, and sometimes the price paid for it. * * * What then constitutes the actual cost

of an article at any particular place, which is purchased there for the purpose of being exported and which is actually exported? The answer is, the price given, and every charge which attended the purchase and the exportation, paid or supposed to be paid, at the place whence the article is exported. The actual cost of a bale of goods purchased at Liverpool, is composed of the price paid for it, or in other words, the prime cost and charges, including commissions on the purchase, the packages, if any, and if the goods were purchased at the manufactory, then it includes not only the prime cost, and all charges attending them to the place of exportation, but also the charges before mentioned, and perhaps many others." *Goodwin* v. *United States*, 10 Fed. Cases, No. 5,554, p. 627.

In 1896, the United States Circuit Court for the Western District of Tennessee repeated the same thought, *Hazleton Tripod Boiler Co.* v. *Citizens' Street Railway Co.*, 72 Fed. 317, 321:

"We are all familiar with the seemingly insuperable difficulty of ascertaining the cost, for example, of producing a pound of cotton or of making a yard of cloth; and perhaps no two persons engaged on the problem would agree on the prime elements of the calculation, as none of the parties, witnesses, or the master can agree on them in this case."

The items of cost were subjected to the decision of a reliable and impartial officer. Many circumstances show that both parties from the beginning to the end of the execution of this contract regarded the premium on the surety bond as a part of the cost of performance of the contract. Even before any such contracts were let the Secretary of War "directed that such premiums should be treated as part of the cost of the work," and insisted on the surety companies reducing their premiums.

(2) *Contemporary Construction.*

The contemporary action of the War Department shows that its officers, directly concerned with the negotiation of such contracts, regarded the bond premium as a reimbursable cost. The Court of Claims has found (Finding III, p. 18:

(a) That before such contracts were signed the War Department and the surety companies negotiated and agreed upon the cost of bonds;

(b) That the Secretary of War directed that such premium should be treated as part of the cost of the work;

(c) That the officer in charge of cantonment construction directed that no bond should be transmitted not conforming to the agreed premium;

(d) That five hundred or more such premiums were reimbursed to contractors;

(e) That the Comptroller's decision disallowing such an item as a part of the cost of the work was not made until January, 1920.

All such circumstances are material to the proper construction of the contract. *United States* v. *Peck*, 102 U. S. 64, 65.

The court below said, rec., p. 20, that these facts showed the War Department's "purpose and intention to pay the cost of such bonds." The original opinion of this court said:

"What is the import of this practical interpretation? The Government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer to express and provide for the purpose of the Government in exercise of the duty with which he was charged, and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent

conduct is necessarily to be considered a definition of them. The officer in a sense is a party to the contract, not only representing but speaking for the impersonality of the Government. Competent, therefore, it would seem, to declare the meaning of the contract."

This is a much stronger case of contemporaneous construction than was decided by this court in *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510, where the court said:

"The whole controversy between the parties as to this item, and also for a portion of the claimants' demand on account of extra work and material, arises out of the fact that the letter of the contract and specifications does not correspond with the plan of the work as furnished by the District engineer and the sample of the work which had been done previously by other contractors, and with which that of the present claimants was to connect. The work as actually done was done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

That was a case coming from the Court of Claims and involved the liability of the District of Columbia, then as now a mere branch or agency of the United States Government. The court there gave controlling effect to a contemporaneous construction contrary to the letter of the contract.

In the present case the construction given to the language by the parties at the time of the execution of

the contract was certainly a natural one. We think it was the only natural one. The fact that the parties concurred in that construction should be controlling as to its correctness.

(3) *Effect of Payment.*

Article IV, quoted, *ante*, p. 3, details the method of payments to the contractor, upon statements prepared by the contractor and the contracting officer, but subject to the control of the contracting officer.

This is followed by the provision:

"The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof."

"All payments" are so made final, not merely disputed payments.

The findings of the Court of Claims, Finding III, foot p. 18, after reciting the payment of the premium to the surety company by the contractor, say:

"Subsequently the said sum of $2500 was paid to plaintiff by the United States in August, 1917, as a part of the costs of the work. Five hundred or more of such payments were made by the United States to contractors who had cost plus contracts with the United States."

Claimant's right to this sum was thereby fixed. The rule of law governing these conditions is exactly stated in *United States* v. *Gleason*, 175 U. S. 588, 602:

"Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of

fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts. *Martinsburg & Potomac Railroad* v. *March*, 114 U. S. 549; *Chicago, Santa Fe, &c. Railroad* v. *Price*, 138 U. S. 185."

The original opinion of this court in the present case applied this rule, saying:

"We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. *Kihlberg* v. *United States*, 97 U. S. 398; *Martinsburg & Potomac Railroad Co.* v. *March*, 114 U. S. 549; *United States* v. *Gleason*, 175 U. S. 588; *Ripley* v. *United States*, 223 U. S. 425. This is extending the rule between private parties to the Government.

"There were such decisions, and settlement, and payments, in consequence of them, as we have seen. Over the effect of these the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect."

The application of this rule to the United States, referred to in the opinion, is as old as the *Kihlberg* case, above cited, and was approved not only in the two cases cited but in *United States* v. *Barlow*, 184 U. S. 123, 133, and very recently in *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393. See also *Chicago, Santa Fe and California Ry. Co.* v. *Price*, 138 U. S. 185, 193; *Sheffield, &c. Ry. Co.* v. *Gordon*, 151 U. S. 285, 292.

The Decision Official, not Personal.

The term "contracting officer" extends by Article XV, quoted, *ante*, p. 4, to "his successor in office, any other person to whom the duties of the contracting

officer may be assigned by the Secretary of War and any duly appointed representative of the contracting officer." This answers completely the suggestion that there is a difference in legal effect between the action of the original contracting officer and that of his successor.

The rule in *Beley* v. *Naphtaly*, 169 U. S. 353, 364, applies:

> "The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office."

It is argued that the discretion here exercised was beyond the scope of the authority granted. But the language is too clear (Article II, Record, p. 6, and top p. 8, *ante*, foot p. 2) "The contractor shall be reimbursed for" * * * "Such bonds * * * as the contracting officer may approve or require." The contracting officer had jurisdiction to approve and did approve. It was then his duty to certify the cost of bond for payment. The payment was made. When made, it was final and binding.

It is of no force against this position to cite cases holding that no officer of the government has power to bind the United States beyond his delegated authority. The authority here exercised was given by the contract. Such authority this court has repeatedly held valid.

CONCLUSION.

Apprehension is expressed on behalf of the United States that the announcement of the principle contended for by the appellees in these cases may afford a precedent of a kind which they do not desire in other litigation in which the United States is or may hereafter become engaged. The declaration of a sound principle in an appropriate case will rightly serve as a guide to justice in later cases. It is not correct to argue against such a declaration merely because it may be quoted in some other cases to which it may or may not be applicable.

As stated in *United States* v. *Phisterer*, 94 U. S. 219, 225:

"The briefs submitted contain suggestions of what would be the result in various cases, which, it is said, may arise under these regulations. Our judgment is intended to be given upon the precise case before us, and upon no other. Should other cases be presented, the Court of Claims will give them the attention required, as will this court, should they come here. Both courts have business enough to occupy them, without anticipating cases which may never be presented."

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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UNITED STATES v. MASON & HANGER COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 121. Argued November 24, 1922.—Decided December 4, 1922.

A building contract, made through the War Department, provided that the contractor should be reimbursed for such actual net expenditures in the performance of the work as might be approved or ratified by the contracting officer, including "such bonds, fire, liability, and other insurance as the contracting officer may approve or require;" that monthly statements of costs should be made, upon which, in case of disagreement, the decision of the contracting officer should govern; and that statements so made and all payments made thereon should be final and binding on both parties. *Held*, that where a payment made by the contractor as a premium on its bond to secure the performance of the contract was thus approved and repaid as part of the cost of the work, the decision and action of the officer were conclusive, and that the Comptroller of the Treasury was without power to deduct the amount from other moneys due the contractor, upon the ground that the expense was not among those for which the contract promised reimbursement. P. 325.

56 Ct. Clms. 238, affirmed.

APPEAL by the United States from a judgment of the Court of Claims. A rehearing was granted in this case; but, after reargument, the judgment below was again affirmed, April 9, 1923, by a per curiam decision, which will be reported in volume 261.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Appeal from a judgment of the Court of Claims which awards the appellee, plaintiff in the Court of Claims, the sum of $12,064.52, composed of three sums which are respectively of the amounts of $2,500, $450 and $9,114.52. The last two sums the United States does not contest. The sum of $2,500 is only, therefore, in question. The amount is charged to be due (as the other sums were) upon what are called "cost plus contracts" for the construction of certain buildings at Camp Zachary Taylor, near Louisville, Kentucky.

It is provided in Article II of the contract that "the contractor shall be reimbursed . . . for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer . . . . (h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. . . ."

The United States contends that within the meaning of Article II the premium paid on a bond of $250,000, that being the amount fixed by the War Department, was not an expenditure in the performance of the work. The Court of Claims decided the contrary and supported its decision by the action and approval of the War Department. And there was no hesitation on the part of the Department. It recognized the obligation of the Government under the contract to pay to the contractor the

amount of premium, and negotiated with the surety companies for a reduction of it in the interest of the Government. The premium was approved by the contracting officer as required by Article II and paid as part of the cost of the work and was not questioned for over two years. Its amount was later deducted from other sums due the contractor.

What is the import of this practical interpretation? The Government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer to express and provide for the purpose of the Government in exercise of the duty with which he was charged, and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent conduct is necessarily to be considered a definition of them. The officer in a sense is a party to the contract, not only representing but speaking for the impersonality of the Government. Competent, therefore, it would seem, to declare the meaning of the contract.

We are, however, not called upon to pass upon the conflicting contentions. The contract contains other provisions that determine the liability of the Government.

Article IV of the contract provides for a monthly statement of the elements of costs upon which, if there be disagreement, the decision of the contracting officer "shall govern." It is further provided that "the statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof." Article XIV requires the contract to be interpreted as a whole, not by any special clause, and takes care to reserve the determining decision to the officers concerned with the work, the final decision being that of the Secretary of War. Article IV, indeed, is the complement and elaboration of the provision of Article II (quoted above) which provides that the contractor is to

be reimbursed for such of its expenditures "as may be approved or ratified by the contracting officer."

We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. *Kihlberg* v. *United States*, 97 U. S. 398; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549; *United States* v. *Gleason*, 175 U. S. 588; *Ripley* v. *United States*, 223 U. S. 695. This is extending the rule between private parties to the Government.

There were such decisions, and settlement, and payments, in consequence of them, as we have seen. Over the effect of these the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect.

Judgment affirmed.

UNITED STATES *v.* NORTHEASTERN CONSTRUCTION COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 122. Argued November 24, 1922.—Decided December 4, 1922.

Decided on the authority of *United States* v. *Mason & Hanger Co.*, *ante*, 323.

56 Ct. Clms. 402, affirmed.

APPEAL by the United States from a judgment of the Court of Claims. See the per curiam decision of April 9, 1923, to be reported in volume 261, reaffirming the judgment after rehearing.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Judgment in this case was rendered at the same time as that in *Mason & Hanger Co.* v. *United States*, just decided, *ante*, 323.

The amounts only are different. In that case it was $2,500—in this case it is $150. In both, the amounts represented premiums on bonds and depend upon the same considerations. On the authority of the *Mason & Hanger Co. Case* the judgment of the Court of Claims in this case is

Affirmed.